In The

Supreme Court of the United States

October Term, 1978

No. 78-674

JUDGE JAMES J. MAYER,
Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, Judge James J. Mayer, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Ohio entered in these proceedings on June 28, 1978.

OPINIONS BELOW

The June 28, 1978, Opinion of the Supreme Court of Ohio, reported at 54 Ohio St. 2d 431, appears in Appendix A to this Petition for Writ of Certiorari, as does the unreported Findings and Order of the Commission of Five Judges (Appendix E) and the unreported full report and finding of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (Appendix F).

JURISDICTION

The Judgment of the Supreme Court of Ohio was entered on June 28, 1978. A timely motion for rehearing was filed by Petitioner and was denied by the Ohio Supreme Court on July 26, 1978.[1] This Petition for Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner was deprived of the Fourteenth Amendment right to due process of law under the doctrine of *Thompson* v. *City of Louisville* when he was ordered retired from the elected office of Judge of the Common Pleas Court without any evidence to support that Order?

2. Whether Petitioner was deprived of the Fourteenth Amendment right to due process of law because he was retired from his elected office through the application of an unforeseeable standard of law not contemplated under the requirements of the statute providing grounds for retirement from office?

3. Whether the involuntary retirement of Petitioner from the office of Judge of the Common Pleas Court constituted a deprivation of Petitioner's Fourteenth Amendment rights to due process of law when he was tried, "convicted" and ordered retired from office even though the allegation constituting grounds for retirement from office had been eliminated prior to the hearing by a body acting in a capacity similar to a grand jury?

[1] A copy of Order denying rehearing is appended to this Petition as Appendix B.

4. Whether Petitioner was involuntarily retired from the office of Judge of the Common Pleas Court for making public statements about public officials, off the bench, in derogation of Petitioner's rights to exercise First Amendment guarantees?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, * * *

United States Constitution, Fourteenth Amendment

> Section 1 * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Ohio Revised Code, Title 27: § 2701.12(A) and (B)

> 2701.12 Cause for removal, suspension or retirement of judge
>
> (A) Cause for removal or suspension of a judge from office without pay under section 2701.11 of the Revised Code exists when he has, since first elected or appointed to judicial office:
>
> (1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;

(2) Been convicted of a crime involving moral turpitude; or

(3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before such election or appointment.

(B) Grounds for retirement of a judge from office for disability exist when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office.

Supreme Court of Ohio Rules For the Government of The Bar of Ohio, Rule VI(7)

7. Mental disability shall mean the condition defined in R.C. 5122.01(A) which presently prevents the proper discharge of the Judge's duties.

Physical disability shall mean the impairment of the faculties of a Judge, which has prevented the proper discharge of his judicial duties for more than six months. Failure to be present in Court or to perform usual judicial functions for six months or more shall raise a presumption of physical disability.

The Commission shall make such determination of disability based upon the testimony adduced before it. Expert medical testimony may be received by the Commission, and it may name medical experts to examine the respondent, with his consent.

A copy of the full text of Sections 2701.11, 2701.12, 5122.01(A) of the Revised Code of Ohio and of the full text of Rule IV and Rule VI of the Supreme Court of Ohio Rules for the Government of the Bar of Ohio are attached as Appendix H and G, respectively.

STATEMENT OF THE CASE

This case involves a proceeding brought by Respondent to remove or retire Petitioner from the office of Judge of the Court of Common Pleas of Richland County, Ohio. Petitioner was first appointed to the bench in 1959 and

has been repeatedly elected thereafter to three successive six-year terms. Petitioner's current term of office expires February, 1979.

In September, 1976, Respondent filed a written complaint against Petitioner with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (hereinafter "Board"). The complaint made two substantive charges: (1) that Petitioner should be removed from office on the grounds of past misconduct because of certain statements he made about elected public officials in 1973 and 1975; and (2) that Petitioner should be "removed" from office because he is presently suffering from a permanent physical and mental disability. The first paragraph alleges statutory grounds for *removal* of a judge from office; the second alleges statutory grounds for *retirement* from office.[2]

Pursuant to the Supreme Court Rules for the Government of the Bar of Ohio, the Board, acting in a capacity similar to a grand jury, investigated the allegations of the complaint. It submitted the following finding to the Supreme Court of Ohio:

> The Board of Commissioners did by the affirmative vote of 13 members, being more than two-

[2] Under Ohio law, a judge can be *removed* from office for misconduct, conviction of certain crimes, or for having been disbarred. (Section 2701.12(A) Ohio Rev. Code). Grounds for *retirement*, however, exist if there is a permanent physical or mental disability which currently prevents the proper discharge of judicial duties. (Section 2701.12(B) Ohio Rev. Code). The Ohio Supreme Court, through its Rules for the Government of the Bar of Ohio, defines physical disability for purposes of § 2701.12(B) as the impairment of the faculties of a judge which prevents the proper discharge of his duties for more than six months. Mental disability is defined as a "mental illness," defined in § 5122.01(A) of the Ohio Revised Code, which *presently* prevents the proper discharge of judicial duties. (Gov. R. VI(7) of the Supreme Court Rules for the Government of the Bar of Ohio).

> thirds of the members of said Board, find that there is substantial credible evidence in support of the *misconduct allegations as set forth in paragraph one* of the complaint, and do hereby report to the Supreme Court. (Emphasis Supplied) (Appendix F, p. 53A).

No finding was made by the Board as to the physical or mental disability allegations – the "retirement" charge contained in paragraph 2 of the complaint.

Thereafter, the Supreme Court of Ohio appointed a Commission of Five Judges to hear evidence regarding the allegations made against Petitioner as found by the Board. At Petitioner's hearing before the Commission of Five Judges, over Petitioner's objection and despite the fact that the physical and mental disability charge had been eliminated, the Commission of Five Judges accepted evidence on this allegation.

Evidence was also admitted on the misconduct allegations. The gravamen of that allegation was that Petitioner made certain "derogatory" statements about elected public officials in letters and speeches. Respondent presented no evidence as to the truth or falsity of those charges. None of those officials sued Petitioner for libel or slander within the period of limitations for bringing such a suit.[3] In fact, evidence indicated that Petitioner's statements were true.[4] Those statements were made by Petitioner when he was *off the bench* and acting in his capacity as citizen.

Having only been charged on the "misconduct" allegations, Petitioner, in order to negate the "willfulness" requirement of the misconduct allegation[5], presented medical testimony as to his *past* medical condition which influenced the behavior which was the subject of that allegation.

The medical evidence presented before the Commission of Five Judges consisted of the testimony of three doctors, one called by Respondent, and two by Petitioner.[6] All the doctors agreed that Petitioner was diagnosed in 1973 as having manic-depression illness.[7] Dr. Brown, the psychiatrist called by Respondent testified that manic-depressive illness in its pure state is a depressive disorder and when uncontrolled by medication is symptomized by wide swings in mood varying from great activity with euphoria to deep gloom.[8] Testimony revealed moreover, that many of our great leaders, including Abraham Lincoln and Theodore Roosevelt,[9] are suspected of having had manic-depression illness at a time when it could not be controlled.[10]

Although there is no cure for manic-depression, since 1970 that condition can now be controlled through the use of the medication lithium carbonate. The doctors indicated that as to eighty percent of persons now suffering

[3] Tr. 4-14-77, p. 154.

[4] Tr. 4-13-77, pp. 67-68.

[5] Governing Rule IV(1) of the Supreme Court Rules for the Government of the Bar of Ohio states that the *willful* breach of the Code of Judicial Conduct shall be grounds for punishment under Rule VI. (Appendix G).

[6] Tr. 3-16-77, Dr. Brown (by Respondent) pp. 16-74; Dr. Loggins 4-12-77, pp. 173-223; Dr. Jones 4-13-77, pp. 127-202.

[7] See e.g. Tr. 4-13-77, p. 130.

[8] Tr. 3-16-77, pp. 27-29; see also Tr. 4-13-77, pp. 158-160.

[9] Manic depression and the effective control of that condition is discussed in the book, *Moodswing, The Third Revolution In Psychiatry* by Dr. Ronald R. Fieve, M.D. and has been the subject of a recent nationwide television program on NBC-TV, "Escape from Madness," shown on June 28, 1978, involving the effective control of manic depression for professional golfer Bert Yancey. Dr. Fieve, in his book, also indicates that he believes such great leaders as Winston Churchill, Abraham Lincoln, and Theodore Roosevelt probably had this condition – in a time before its complete control could be achieved by medication.

[10] Tr. 4-13-77, pp. 160-62.

from manic depression, the undesirable or "illness" aspects of the condition can be *fully controlled medically* with lithium carbonate, a quieting agent that keeps the person in his normal mood state.[11] Petitioner is within that eighty percent group.[12]

The taking of lithium is analogous to the taking of insulin to control diabetes[13] or the taking of dilantin for epilepsy.[14] Because Petitioner appreciates the value and effect of lithium, all the doctors, including the psychiatrist called by Respondent agreed that Petitioner can be expected to scrupulously and faithfully adhere to a proper program of medication.[15] For only a brief period following his once-in-a-lifetime surgeries for carcinoma of the large intestine and of the liver and the massive reactions to the chemotherapy, the proper lithium level for Petitioner could not temporarily be maintained.[16] It was during that time that the actions upon which Petitioner was charged occurred.

After the arrest of the carcinoma and the recovery from surgery however, and *since January, 1976, no undesirable* symptoms of manic-depression have occurred. Petitioner is now *properly, adequately,* and *fully* controlled by lithium medication.[17] He will not again suffer the adverse effects of the manic phase.[18]

Under the statute providing grounds for retirement of a judge from office, § 2701.12(B), it was necessary for

[11] Tr. 3-16-77, pp. 24-25.

[12] Tr. 4-13-77, p. 156.

[13] Tr. 4-13-77, p. 196.

[14] Tr. 4-13-77, p. 197.

[15] Tr. 3-16-77, p. 55; 4-13-77, p. 191.

[16] Tr. 3-16-77, p. 52.

[17] Tr. 4-13-77, pp. 151-52.

[18] Tr. 4-13-77, p. 156.

Respondent to have proved by clear and convincing evidence that Petitioner *has* (a) a permanent (b) physical or mental disability which (c) prevents the proper discharge of his duties of office. As to the crucial elements, there is *no* evidence, and in fact the evidence is to the contrary.

When asked whether Petitioner presently has a mental disability, defined by the Ohio Supreme Court Rules as a "mental illness" under Section 5122.01(A), the psychiatrist called by *Respondent* testified that,

> I found at the time when I talked to him, he [Petitioner] was coherent, logical, rational, oriented, memory intact. At that point, there was no indication of mental illness.[19]

Moreover, quoting Section 5122.01(A) almost verbatim, Respondent's psychiatrist stated "by that definition at that date, he was not mentally ill."[20] And, *when asked by Petitioner* on cross-examination whether someone who suffers from manic depression but who is controlled by lithium would be able to effectively function as a judge, Respondent's own witness testified that Petitioner can and would be able to function effectively, even brilliantly.[21] The non-medical record amptly demonstrates, furthermore, that Petitioner has performed brilliantly. He has received over *six* major awards from the Supreme Court of Ohio; he has received awards from the Richland County Bar Association, the Richland County Medical Association, the Richland County AFL-CIO; he has won the coveted Carl V. Weygandt Award twice and a citation from the Ohio General Assembly.[22]

The doctors called by Petitioner also indicated affirmatively that Petitioner is presently able to function effec-

[19] Tr. 3-16-77, p. 24.

[20] Tr. 3-16-77, p. 33.

[21] Tr. 3-16-77, p. 58.

[22] Tr. 4-14-77, p. 32; 4-12-77, pp. 254-55.

tively as a judge, and that he would continue to be able to so function. As the psychiatrist who attended Petitioner during the period in question, Dr. Jones, testified, he would not "be concerned about going before a court where he [Petitioner] was a judge."[23] Petitioner's general practitioner also indicated that in his observation Petitioner is capable of performing the duties of a judge and that he has no reason to feel otherwise.[24]

Finally, at the hearing held before the Commission of Five Judges, attorneys H. Eugene Ryan, Robert Gillespy, Stewart Jaffy, James Calhoun, William Calhoun, George Hall, A. Robert Matthews and Judges William Morris and Forrest A. MacDonald testified before the Commission that Petitioner has always upheld the Canons of Judicial Ethics and that he has run his court extremely well, if not superbly, during all times that they have appeared before him or participated with him on multi-judge courts.[25] No evidence to the contrary was offered by Respondent.

Despite the complete absence of evidence as to the elements of the "retirement" charge, despite the fact that the evidence affirmatively contradicts the crucial elements of Respondent's case, and despite the fact that the "retirement" allegation had been eliminated prior to the hearing, the Commission of Five Judges, by a divided vote, ordered that Petitioner be retired from office for disability. (Appendix E, p. 22A).

On appeal, the Supreme Court of Ohio affirmed the Commission's order. Rejecting Petitioner's First Amendment arguments and the contention that absolutely no evidence existed to support the Commission's findings and

[23]Tr. 4-13-77, pp. 191-92.

[24] Tr. 4-12-77, p. 201.

[25]Tr. 4-12-77, pp. 224-33; 4-13-77, pp. 50-102 and 122-266; 4-14-77, pp. 6-20.

order that Petitioner be retired for disability, the Court enunciated a new standard not contemplated by the terms of the statute or any decided case, and therefore not anticipated by Petitioner. The Court stated that given Petitioner's present physical "condition," "there is ever-present a *latent possibility* of recurrence of the conditions which precipitate erratic and non-judicious conduct." (Emphasis supplied) 54 Ohio St. 2d at 436 (Appendix A, p. 6A).

Thereafter, Petitioner filed a timely Motion for Rehearing before the Supreme Court of Ohio pointing out that the "latent possibility" standard violated Petitioner's rights to due process under the Fourteenth Amendment to the United States Constitution. That Motion was denied on July 26, 1978. A temporary stay of twenty days was granted by the Ohio Supreme Court pending the filing of an application for an indefinite stay with this Court.[26]

On August 11, 1978, Justice Potter Stewart granted Petitioner's application to this Court for a stay of the Supreme Court of Ohio's mandate pending the timely filing of a Petition for Writ of Certiorari and decision by this Court.[27]

Throughout the course of these proceedings, Petitioner has at every opportunity raised the question whether the action which was being instituted against him and for which he was ultimately retired from office constituted a violation of Petitioner's First Amendment right to freedom of speech as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. In both his oral motion for dismissal or acquittal and in his Brief in Lieu of Oral Argument directed to the Commission of Five Judges and in his brief to the Supreme Court of

[26] A copy of that Order is appended as Appendix C to this Petition.

[27] A copy of that Order is appended as Appendix D to this Petition.

Ohio, Petitioner specifically argued that the actions of Respondent's complaint involved speech or statements of Petitioner which are protected by the First Amendment to the United States Constitution. Those contentions were again raised in Petitioner's Motion for Rehearing submitted to the Ohio Supreme Court.[28] Those contentions were deemed to be without merit by both the Commission of Judges and the Supreme Court of Ohio.

When the Supreme Court of Ohio in effect rejected Petitioner's contention that there was *no evidence* in the record to support the retirement for disability of Petitioner, a point raised before the Commission of Judges and the Supreme Court of Ohio,[29] the Supreme Court of Ohio enunciated the unforeseen standard that given Petitioner's present condition "there is ever-present a *latent possibility* of recurrence of the conditions which precipitate erratic and non-judicious conduct. (Emphasis supplied) 54 Ohio St. 2d at 436 (Appendix A, p. 6A). Using that standard, the Court implicitly recognized that there was no evidence to support the Commission's Order. Yet, the retirement order was affirmed. At the first opportunity to present the federal due process question on this newly enunciated "latent possibility" standard, Petitioner filed a Motion for Rehearing before the Supreme Court of Ohio and in addition to discussing the First Amendment issue

[28]Tr. 4-13-77, pp. 152-53; Brief In Lieu of Oral Argument before Commission of Judges; Proposition of Law No. II(F) pp. 43-51, Brief to Supreme Court of Ohio "The Actions of [Petitioner] Upon Which The Finding and Action . . . of The Commission Is Premised All Relate to Statements of [Petitioner] Which Are Protected By The First Amendment To the U.S. Constitution"; Motion for Rehearing pp. 11-13.

[29] Tr. 4-12-77, p. 154; Brief in Lieu of Oral Argument before Commission of Judges; Proposition of Law I pp. 3-12, Brief to Supreme Court of Ohio.

in light of *In re Primus*, 46 U.S.L.W. 4519 (1978)[30] and the lack of evidence in the record, Petitioner stated:

> . . . [T]he use of the . . . 'latent possibility' standard . . . runs afoul of [due process] decisions and has the effect of depriving [Petitioner] of the benefits of his office without due consideration for those rights secured to him by the Fourteenth Amendment to the United States Constitution.[31]

and

> Petitioner also stated in that Motion:
>
> Further, it is submitted that by interpreting the applicable provisions regarding retirement of a judge from office in such a broad and overreaching manner deprives [Petitioner] of the benefits of office to which he was duly elected by the people of this state in derogation of his constitutional rights to due process of law under the Fourteenth Amendment to the United States Constitution.[32]

The Ohio Supreme Court refused to consider Petitioner's assertions that his rights under the Fourteenth Amendment had been violated and ruled against him without opinion or citation of any authority. (Appendix B).

Before the Commission of Judges, the stage at which the evidence was presented, Petitioner, furthermore, moved for a mistrial[33] and objected to the admission of evidence regarding Paragraph 2 of the Complaint.[34] He argued at the end of Respondent's case that Paragraph 2 was deleted by the Board of Commissioners on Grievance and Discipline,[35] and asserted in the brief before the Com-

[30]Motion for Rehearing, pp. 11-13.

[31]Motion for Rehearing, p. 7.

[32]Motion for Rehearing, pp. 2-3.

[33] Tr. 3-15-77, p. 78.

[34]Tr. 3-16-77, pp. 11-12.

[35] Tr. 4-12-77, pp. 153-54.

mission that Petitioner's health is not an issue.[36] Throughout the course of these proceedings, Petitioner has noted that because of the quasi-criminal nature of these proceedings, Petitioner was entitled to protections of due process of law under the Fourteenth Amendment to the Constitution of the United States.[37] Without specifically deciding, the Supreme Court of Ohio has, in effect, overruled Petitioner's contentions.

REASONS FOR GRANTING THE WRIT

A. SINCE THERE IS NO EVIDENCE TO SUPPORT THE FINDING AND ORDER OF THE COMMISSION OF FIVE JUDGES AND THE DECISION OF THE SUPREME COURT OF OHIO THAT PETITIONER BE RETIRED FOR DISABILITY, THE DECISION OF THE SUPREME COURT OF OHIO CONFLICTS WITH THE RULE ESTABLISHED IN THOMPSON V. CITY OF LOUISVILLE AND CONSTITUTES A DEPRIVATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

At the outset, it must be emphasized that the proceedings brought against Petitioner can only be described as quasi-criminal in nature. This Court has held that the disbarment of an attorney is a "punishment or penalty" imposed on the person involved and that therefore such proceedings are of a quasi-criminal nature. *In Re Ruffalo,* 390 U.S. 544 (1968); *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Ex parte Garland,* 4 Wall 333 (1866). Since the involuntary retirement of an elected official from the office to which he is duly elected is as much, if not more, of a

[36] Brief in Lieu of Oral Argument.

[37] Tr. 4-12-77, p. 153; Brief in Lieu of Oral Argument; Supreme Court of Ohio Brief, pp. 39-42 and 51-53.

drastic action as the disbarment of an attorney, it follows logically that the proceedings brought against Petitioner are likewise of a quasi-criminal nature. Ohio law recognizes that principle. *McMillen* v. *Diehl,* 128 Ohio St. 212 (1934); *State ex rel Corrigan* v. *Hensel,* 2 Ohio St. 2d 96 (1965). Petitioner submits that in light of the quasi-criminal nature of these proceedings, certain due process protections afforded persons convicted of crimes should have been given Petitioner. They were not.

In *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960), this Court definitively held in the criminal context that if there is no evidence in the record to support the imposition of a punishment, the conviction does not comport with due process of law:

> Under the words of the ordinance itself, if the evidence fails to prove all [the] elements of [the] . . . charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. 362 U.S. at 204.

Inherent in that process which is due someone who is being punished by the state is the concept that at least *some evidence* must be presented to support the judgment:

> Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt. 362 U.S. at 206.

This Court has consistently upheld this principle in criminal convictions. In those situations, if the Court, after an independent examination of the record, determined that the record was completely lacking any relevant evidence as to any one crucial element of the offense, the conviction was reversed. *Vachon* v. *New Hampshire,* 414 U.S. 478 (1974); *Douglas* v. *Buder, Judge,* 412 U.S. 430 (1973); *Johnson* v. *Florida;* 391 U.S. 596 (1968); *Barr* v. *City of Columbia,* 378 U.S. 146 (1964); *Edwards*

v. *South Carolina,* 372 U.S. 229 (1963); *Garner* v. *Louisiana,* 368 U.S. 157 (1961). This principle has been similarly applied in the context of juvenile convictions. *In Re Winship,* 397 U.S. 358 (1970). And, this Court has held in a context similar to the instant case, even prior to *Thompson,* that a record entirely devoid of evidence of the condition prohibiting an applicant from being licensed as an attorney does not pass constitutional muster. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

Petitioner recognizes that this Court has never definitively decided whether the doctrine of *Thompson* v. *City of Louisville, supra,* applies in proceedings of this nature. In fact, this Court, in *Wood v. Strickland,* 420 U.S. 308 (1975) specifically reserved that question in the context of school disciplinary procedures invoked against students:

> Although it did not cite the case as authority, the Court of Appeals was apparently applying the due process rationale of *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960), to the public school disciplinary process. The applicability of *Thompson* in this setting, however, is an issue that need not be reached *in this case.* (Emphasis supplied) 420 U.S. at 323.

This case, however, directly presents the issue of whether the doctrine of *Thompson* applies in this quasi-criminal setting. It is of vital importance that that issue be decided in this case. Not only is that question of importance to Petitioner in light of the record that has developed, but it has vital significance to all members of the bench and all elected public officials. To allow someone, as in this situation, to be involuntarily retired or removed from office when there is no evidence to support the grounds for that action would be to open our judicial system to political manipulation. (See Kerns, J. dissenting opinion to Findings and Order of Commission of Five Judges, Appendix E, p. 43A). Involuntary retirement of

a public official without any evidence in the record to support that retirement cannot withstand constitutional scrutiny.

Assuming the doctrine of *Thompson* v. *City of Louisville* applies, it is clear that in this case, Petitioner was deprived of due process. The statute under which Petitioner was retired from office is § 2701.12(B) of the Ohio Revised Code. It provides:

> Grounds for retirement of a Judge from office for disability exist when he has a permanent physical or mental disability[38] which prevents the proper discharge of the duties of his office.

Under the statute, therefore, it was incumbent upon the Respondent to have proved that Petitioner *has*: (a) a "permanent" (b) "physical or mental disability" and (c) that this disability "prevents the proper discharge of the duties of his office." Under the Supreme Court of Ohio's Rules, moreover, Respondent needed to prove that Petitioner was mentally ill as defined in § 5122.01(A) of the Ohio Revised Code and that that mental illness "presently prevents a proper discharge of the judge's duties." Alternatively, Respondent needed to prove that there was a physical disability which prevented the proper discharge of his duties for more than six months.

A review of the record reveals that there is no evidence of *any of these elements.* In fact, the evidence in

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[38] Supreme Court Rule VI(7) defines mental and physical disability for purposes of these proceedings:

> Mental disability shall mean the condition defined in R.C. 5122.01(A) which presently prevents the proper discharge of the Judge's duties.
>
> Physical disability shall mean the impairment of the faculties of a Judge, which has prevented the proper discharge of his judicial duties for more than six months. Failure to be present in Court or to perform usual judicial functions for six months or more shall raise a presumption of physical disability.

the record is directly to the contrary. That evidence affirmatively shows that Petitioner is *not* physically or mentally disabled under the statute or Rules, he is *not* mentally ill, and it affirmatively shows that Petitioner *is* properly discharging the duties of his office. As set forth in the Statement of the Case, the doctors all testified that since Petitioner's condition is controlled by lithium he *is able* to function effectively, even brilliantly as a judge, he is *capable of performing* the duties of his office, and that no concern should be felt for going before a court where he is judge.

Because Petitioner has been deprived of substantial constitutional rights and because of the importance of this question to all elected officials, the Writ of Certiorari should be granted by this Court.

B. THE FORMULATION AND APPLICATION OF THE "LATENT POSSIBILITY" STANDARD BY THE SUPREME COURT OF OHIO TO RETIRE PETITIONER FROM HIS JUDICIAL OFFICE CONSTITUTED A DEPRIVATION OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS OF DUE PROCESS OF LAW.

As noted, the Commission of Five Judges ordered Petitioner retired from office for disability. This occurred despite the total absence of evidence on the crucial elements constituting grounds for retirement and despite the fact that the evidence showed *affirmatively* that Petitioner *does not* suffer from a physical or mental disability or that he is prevented from properly discharging the duties of his office.

The Ohio Supreme Court affirmed the Commission's order of retirement of Petitioner under the statute. But, because the Court could point to no evidence that Petitioner has a disability, be it physical or mental, which prevents the proper discharge of his duties, the Court

instead held that, "given appellant's [Petitioner's] present physical condition, there is ever-present a *latent possibility* of recurrence of the conditions which precipitate erratic and non-judicious conduct." (Emphasis supplied) 54 Ohio St. 2d at 436 (Appendix A, p. 6A). This use of a "latent possibility" standard is an unforeseeable and retroactive judicial expansion of the clear, narrow, and precise terms of Section 2701.12(B) of the Ohio Revised Code in violation of Petitioner's right to fair notice of the charges under the Fourteenth Amendment to the Constitution of the United States.

In the criminal context, this Court has held in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), that a deprivation of due process can result not only from vague statutory language but also from an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. This Court explicitly held in that case that:

> When . . . [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. *Id.* at 354-55.

The reason that the *Bouie* doctrine should be made applicable to the instant situation is made clear by what happened to Petitioner. Having been charged only on the misconduct allegations, Petitioner produced evidence of his past medical condition which influenced the alleged "misconduct" in order to negate the willfulness element of that "misconduct" allegation. By formulating a strained construction of the precise terms of Section 2701.12(B), the Supreme Court of Ohio, not being able to find any evidence to support *present* mental or physical disability as required by the applicable statute, used that evidence of past medical conditions against Petitioner. This was

done by means of formulating and applying a standard of "latent possibility" not contemplated by the statute or rules and which Petitioner could not have envisioned prior to the hearing.

To support the fact that Petitioner could not have envisioned such a "latent possibility" standard prior to the hearing or at any time during the course of these proceedings is the fact that under Ohio law, and the law of any other jurisdiction known to Petitioner, evidence of possibility – even in the *civil* context – is legally not probative. *Gerich* v. *Republic Steel Corp.*, 153 Ohio St. 463 (1950); *Brandt* v. *Mansfield Rapid Transit, Inc.*, 153 Ohio St. 429 (1950); *Landon* v. *Lee Motors*, 161 Ohio St. 82 (1954). The law concerns itself with probabilities, not "possibilities." Moreover, the Ohio Supreme Court in *State ex rel Corrigan* v. *Hensel*, 2 Ohio St. 2d 96 (1965), an analogous case to the instant one involving a forfeiture of public office of an elected member of the school board, the Supreme Court of Ohio even specifically rejected such a "possibility" standard:

> Under the 'could' or 'possibility' doctrine, few public officials could remain in office even though there had been no dereliction of duty.
>
> The *law does not punish an officeholder for what he 'could do' or where there was a 'possibility' or opportunity to commit some wrongful act.*
>
> 2 Ohio St. 2d at 99. (Emphasis supplied).

Application of such a fundamentally unfair criterion which is not founded upon statute, rule, case authority or common sense, contravenes Petitioner's rights to due process of law. Moreover, under such a "latent possibility" standard *any judge* or other public official is subject to being retired from office. Because medical and physical conditions can and do plague each of us, the standard used by the Ohio Supreme Court must be reviewed in light of the vital importance that decision has on any judge, lawyer, or elected official who has or who in the

future *might* have medical problems. In short, everyone is affected by this decision. Surely due process is not consonant with the compulsory retirement of a judge because of diabetes which is controlled by insulin. Neither should a judge be forced to retire for epilepsy which is controlled by dilantin. Nor can due process permit the retirement for disability of a judge because of a heart condition when that condition is controlled by a pacemaker or medication. Similarly, it was not proper under concepts of due process to order Petitioner retired for disability when he has a manic-depression illness *effectively controlled* by medication under some strained and unforeseen "latent possibility" construction of the statute. Such an interpretation is tantamount to creating an irrebutable presumption that Petitioner's illness, even though effectively controlled by medication will prevent him from performing his judicial functions properly. That interpretation violates due process. *See e.g. Vlandis* v. *Kline*, 412 U.S. 441 (1973).

Because of the application of such an unforeseeable construction of the "retirement" statute, and because of the importance that decision has on any judge or elected official, a Writ of Certiorari should issue in order to determine whether the application of such a standard comports with due process of law.

C. THE TAKING OF EVIDENCE AND THE "CONVICTION" OF PETITIONER BY THE COMMISSION OF FIVE JUDGES AND THE AFFIRMANCE OF THAT DECISION BY THE SUPREME COURT OF OHIO ON A CHARGE WHICH HAD BEEN ELIMINATED PRIOR TO THE PROCEEDING DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AND IS IN CONFLICT WITH PRINCIPLES ESTABLISHED BY THIS COURT'S DECISIONS.

This Court has held in cases involving disbarment of attorneys that because of the quasi-criminal nature of

such proceedings, the person charged is entitled to protections of due process of law. *In Re Ruffalo,* 390 U.S. 544 (1968); *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Ex parte Garland,* 4 Wall 333 (1866). Such protection is also provided in the civil context. *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Goss* v. *Lopez,* 419 U.S. 565 (1975). One of the most crucial requirements of that protection is adequate notice of the charge and an opportunity to defend upon the charge as made. *In Re Ruffalo, supra.*

Another deprivation of Petitioner's due process rights occurred because of the procedure that was invoked against him. Although the original complaint filed by Respondent alleged grounds for both "removal" from office for misconduct and "retirement" from office for disability, the Board of Commissioners on Grievances and Discipline, a body acting in a capacity similar to a grand jury, made a charge to the Supreme Court of Ohio finding substantial credible evidence on only the first paragraph of the complaint – the "misconduct" allegation. (Appendix F, p. 53A). The Board failed to find substantial credible evidence in support of paragraph two – the "retirement for disability" allegations.

Because paragraph two, dealing with the retirement of a judge from office was eliminated by the Board, Petitioner was entitled to have the hearing be conducted only on the first paragraph – the "misconduct" allegation. To negate the "willfulness" requirement of the misconduct allegation[39], Petitioner presented medical testimony as to his *past* medical condition which influenced the behavior which was the subject of the "misconduct" charge.

---

[39]Gov. R. IV(1) of the Supreme Court Rules for the Government of the Bar of Ohio states that the willful breach of the Code of Judicial Conduct shall be grounds for punishment as provided in Rule VI.

Over the objections of Petitioner, the Commission of Five Judges took evidence *on both* the first and second allegations of the complaint. Indeed, the Commission actually decided the case on the "retirement" allegation and ordered Petitioner retired for disability "for the reasons that [Petitioner] has a physical and mental disability which prevents the proper discharge of the duties of his office." Appendix E, p. 22A. This occurred despite the fact that there was no evidence in the record to support this order. (See discussion *supra*).

Petitioner was "convicted", therefore, on a charge for which the body acting as a grand jury refused to indict. The Supreme Court of Ohio affirmed that decision.

A situation analogous to the present case was presented to this Court in the criminal context in *Cole* v. *Arkansas,* 333 U.S. 196 (1948). In *Cole* the petitioners were tried and convicted in a state court under an information charging them only with a violation of section 2 of a state statute. Upon appeal to the state supreme court, the court sustained their convictions on the grounds that the information charged and the evidence showed that petitioners had violated section 1 of the act. This Court reversed the state supreme court's judgment and held that petitioners were denied due process of law. Justice Black, writing for the Court, noted that if petitioners were charged with a violation of section 1 of the act, it was doubtful whether the information fairly informed them of that charge or that they sought to defend themselves against that charge. Citing *In Re Oliver,* 333 U.S. 257 (1948), Justice Black further stated that no principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard on the issues raised by that charge are among the constitutional rights of each accused. This Court concluded:

> It is as much a violation of due process to send an accused to prison following conviction of a

> charge on which he was never tried as it *would be to convict him upon a charge that was never made.* (Emphasis supplied) 333 U.S. at 201.

In federal criminal cases, moreover, it is clearly a deprivation of due process for a person to be tried for a felony on charges not presented in an indictment returned by a grand jury. *Stirone* v. *United States*, 361 U.S. 212 (1960); *Russell* v. *United States*, 369 U.S. 749 (1962).

The case of *In Re Ruffalo*, 390 U.S. 544 (1968) involved the disbarment of an attorney from the federal court on the basis of action taken by the Supreme Court of Ohio. Noting that disbarment proceedings are quasi-criminal in nature and that one is entitled to procedural due process, including fair notice of the charge, this Court concluded that because the charges were not known to the petitioner in that case before the proceedings commenced, petitioner was deprived of due process:

> This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. 390 U.S. at 552.

The procedure that was invoked against Petitioner herein is in conflict with the principles established by this Court and violates that process which must be due a member of the bench or any other elected public official involuntarily "retired" from office. Petitioner was tried and convicted on a charge which had been eliminated prior to the hearing. Like in *Ruffalo* and the criminal cases cited, having a trial and actually being convicted on charges eliminated prior to the hearing violates all concepts of due process. Such an action contravenes Petitioner's rights to notice and fair hearing as secured to him by the Fourteenth Amendment to the Constitution of the United States. For that reason, this Court should grant the Writ of Certiorari and review the judgment of the Commission of Five Judges and the Supreme Court of Ohio.

D. BECAUSE NO EVIDENCE EXISTS TO SUPPORT THE RETIREMENT OF PETITIONER FROM HIS JUDICIAL OFFICE, THE ACTION BY THE COMMISSION OF FIVE JUDGES AND SUPREME COURT OF OHIO VIOLATED PETITIONER'S FIRST AMENDMENT RIGHTS.

Because there is absolutely no evidence in the record to support the retirement of Petitioner from office and because the body acting in a grand jury capacity eliminated the charge involving grounds for retirement prior to the hearing, it must be concluded that the Supreme Court of Ohio took the action it did as a means to punish Petitioner for certain statements he made which are protected by the First Amendment to the Constitution of the United States. These proceedings began as charges of misconduct against Petitioner because of public statements he made about certain public, elected officials in Richland County, Ohio. It is clear that under this Court's rulings, Petitioner cannot be removed (or retired) from the office to which he was duly elected for the exercise of his right to freedom of speech while acting as a private citizen and *not* while on the bench. Such action is in violation of the First Amendment to the Constitution of the United States as made applicable to the states through the Fourteenth Amendment.

In *Perry* v. *Sindermann*, 408 U.S. 593 (1972); this Court held that the government cannot deny a benefit to a person because he exercises his constitutionally protected right of freedom of speech. This guarantee of freedom of speech is especially deserving of protection in this case where the speech involves *public issues* and *public officials*. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963). If speech involves comments on issues of public interest, it clearly falls within the First Amendment's ambit. *NAACP* v. *Button, supra; Bridges* v.

California, 314 U.S. 252 (1941); *Garrison* v. *Louisiana*, *supra*.

An attorney does not surrender his freedom of expression when he becomes licensed to practice law. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). In fact, this Court has just recently held, after oral arguments of this case in the Ohio Court, that an attorney cannot, consistent with First Amendment freedoms, be disciplined by a state bar association for exercising First Amendment rights in the political context. *In Re Primus*, 46 U.S.L.W. 4519 (May 30, 1978). As this Court stated in *Primus*, when expression involves political expression, as opposed to commercial speech, a "distant *possibility* of harm cannot justify proscription" of such First Amendment activity. (Emphasis supplied) *Id.* at 4526.

It is indeed ironic that today we still question whether a judge, because he is a judge, must shed his First Amendment rights. That same question was raised by Justice Chase of the Supreme Court of the United States who was being tried in 1803 for statements of grave impropriety while performing judicial duties. Fortunately, Justice Chase was acquitted by the Senate. Yet, his plea to the Senate on that article of impeachment must be remembered:

> Is it not lawful for an aged patriot of the Revolution to warn his fellow-citizens of dangers, by which he supposes their liberties and happiness to be threatened? *Or will it be contended that a citizen is deprived of these rights because he is a judge? That his office takes from him the liberty of speech which belongs to every citizen, and is justly considered as one of our most invaluable privileges? I trust not. Annals*, 8 Cong., 2 sess. p. 556. *See also* Malone, Dumas *Jefferson the President* (1948)

Petitioner's statements were made off the bench and while acting in his capacity as a citizen, not a judge. His

speech involved criticism of public officials, the speech entitled to the greatest protection under the First Amendment. It is submitted that, because of the action taken against Petitioner, this Court should grant the Writ of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Ohio.

Respectfully submitted,

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Dated: October 20, 1978

Appendices

APPENDIX A

THE OHIO STATE BAR ASSOCIATION, APPELLEE, v. MAYER, APPELLANT.

[Cite as Ohio State Bar Assn. v. Mayer (1978), 54 Ohio St. 2d 431.]

Judges—Misconduct—Retirement for disability.

(J.D. No. 78-1—Decided June 28, 1978.)

APPEAL from Commission of Judges.

Relator-appellee, Ohio State Bar Association, filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio, seeking the retirement, removal or suspension from office of respondent-appellant, Judge James J. Mayer.

The first two paragraphs of the complaint state:

"1. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason Respondent engaged in ° ° ° conduct ° ° ° prejudicial to the administration of justice and for the reason that Respondent engaged in ° ° ° conduct ° ° ° which would bring the judicial office which he holds into disrepute.

"2. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent is suffering from a physical disability and from a mental disability ° ° °."

After investigation in compliance with Gov. R. VI and R. C. 2701.11, the board reported to the Supreme Court its finding that "° ° ° there is substantial credible evidence

in support of the misconduct allegations as set forth in paragraph one of the complaint ° ° °." Thereafter, the Supreme Court, pursuant to Gov. R. VI and R. C. 2701.11 appointed a five-judge commission to determine the question of retirement, removal or suspension of appellant.

The commission of judges conducted a hearing in the matter and ordered that appellant "° ° ° be retired for disability as a Judge of the Court of Common Pleas for Richland County, Ohio with the right to any emoluments, benefits and compensation allowed by law."

Appellant appealed the order of the commission to this court and moved for a stay of the order of the commission pending disposition of the appeal. The motion to stay was granted and the cause is now before the court for a determination of the question whether the order of the commission should be affirmed, reversed or modified.

Mr. John R. Welch, Mr. Albert L. Bell, Mr. Harlan S. Hertz and *Mr. Eugene Balk*, for appellee.

Messrs. Vorys, Sater, Seymour & Pease, Mr. Russell P. Herrold, Jr., Mr. Larry R. Thompson and *Mr. James J. Mayer*, for appellant.

Per Curiam. Appellant's first proposition of law asserts that the evidence does not support the finding and order of the commission that he should be retired for disability.

In his brief, appellant admits that the "medical evidence in this case is clear and uncontroverted." The commission, in its Findings and Order summarized that evidence as follows:

"The evidence established, and the respondent in his brief candidly admits, that beginning in 1961 respondent experienced numerous health problems. In 1961 respondent contracted viral encephalitis, African sleeping sickness. Prior to 1973 he experienced increasing problems of sleeplessness and depression. He used alcoholic beverages to excess and in October of 1973 engaged in a public brawl

with the manager of a Lima restaurant. Thereafter he was admitted to the University Hospital in Columbus where he was diagnosed as being a manic depressive.

"Lithium carbonate was prescribed for respondent. The proper dosage was determined to be one which would maintain a blood level of Lithium at .7%. Respondent was released from University Hospital on November 15, 1973. In October 1974 respondent was advised that he had massive cancer of the large intestine. Thereafter all except the last foot of that organ was removed.

"Carcinoma of the liver was also found. Respondent was released in November 1974. Thereafter, he suffered rectal and urinary incontinence, diarrhea and severe vomiting. As a result of these afflictions, respondent could not or did not maintain the required .7% Lithium level.

"On May 11, 1975, respondent entered the Cleveland Clinic to undergo surgery for the removal of a portion of his liver affected by cancer. Following his release he took a variety of medication. This produced several side effects, including incontinence. Respondent's Lithium level, because of this and also a failure to take the proper dosage, was not maintained at the proper level. Respondent again returned to the Cleveland Clinic for treatment relative to his Lithium level, diarrhea, vomiting, asthmatic and prostate problems.

"The medical evidence is undisputed that surgery has probably arrested the carcinoma of the intestine and that the respondent has lived beyond the life expectancy of persons who have had surgery involving carcinoma of the liver. Further the respondent offered probative evidence that his manic depressive mental condition is controlled through the maintenance of a .7% level of Lithium Carbonate in his blood."

Appellant refers to the testimony of two psychiatrists to the effect that appellant's condition of manic depression is presently controlled by medication; he contends

that "° ° ° the finding of the Commission that Respondent *now* suffers from such disability which presently prevents the proper discharge of the duties of his office is clearly erroneous."

Section 7 of Gov. R. VI, reads:

"Mental disability shall mean the condition defined in R. C. 5122.01(A) which presently prevents the proper discharge of the Judge's duties.

"Physical disability shall mean the impairment of the faculties of a Judge, which has prevented the proper discharge of his judicial duties for more than six months. Failure to be present in Court or to perform usual judicial functions for six months or more shall raise a presumption of physical disability.

"The Commission shall make such determination of disability based upon the testimony adduced before it. Expert medical testimony may be received by the Commission, and it may name medical experts to examine the respondent, with his consent."

R. C. 2701.12(B), provides:

"Grounds for retirement of a judge from office for disability exist when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office."

Appellant argues that: "Since *all* the medical evidence is to the effect that Respondent does not suffer from any present disability which *now* prevents his performance of his job, and since all the evidence shows that he *now* is able to and actually *now* is properly performing his duties, the Commission's Findings and Order are not supported by any – let alone substantial – clear and convincing evidence ° ° °."

In its Findings and Order, the commission stated:

"When respondent's Lithium level is not maintained, his history, as adduced by the evidence, establishes by clear and convincing evidence that he enters into the

manic or hypo manic phase of manic depression, suffers from delusions, and has paranoid symptoms. Respondent contends that since January 1976 he is properly, adequately and fully controlled and no concern should be felt for his proper handling of his judicial duties.

"A majority of the Commission regretfully does not agree.

"Evidence was submitted supporting by clear and convincing evidence the allegations contained in the complaint. We find therefore that respondent ° ° ° engaged in acts which violated Canon 1, Canon 2A of the Code of Judicial Conduct and Canons 4 and 34 of the Canons of Judicial Ethics. He has engaged in such acts as resulted in a substantial loss of public respect for his judicial office, brought his judicial office into disrepute and has engaged in conduct prejudicial to the administration of justice."

In support of the foregoing conclusions, the commission referred to evidence showing that "° ° ° respondent in letters, in a brief which he prepared, duplicated and disseminated 25 copies, in conversations and at public meetings referred to a fellow judge as a liar, a cruel sadist, as the Godfather, as part of the Gilligan Mafia, a. k. a. the Dirty Dozen, that the Prosecuting Attorney of the county belonged to the Mafia and was incompetent ° ° °."

The provisions of the Code of Judicial Conduct and Canons of Judicial Ethics cited by the commission read as follows:

"Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary.

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

"Canon 2 A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

"Canon 4. Avoidance of Impropriety.

"A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach."

"Canon 34. A Summary of Judicial Obligation.

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."

The record amply demonstrates that when appellant's lithium level is not properly maintained he has engaged in conduct violative of the foregoing canons. Given appellant's present physical condition, there is ever-present a latent possibility of recurrence of the conditions which precipitate erratic and non-judicious conduct. Bearing in mind that Gov. R. VI, as stated in Section 13, is to be "* * * liberally construed for the protection of the public and the Courts * * *," this court concludes that the commission did not err in finding that appellant "* * * has a physical and mental disability which prevents the proper discharge of the duties of his office."

In his second proposition of law appellant urges that his "* * * acts while experiencing severe medical problems in 1973 through 1975 are not acts of misconduct which require or support that he now be retired, removed or suspended from the position to which he has been repeatedly elected."

Noting that there has not been "* * * any suggestion that Respondent was engaged in any misconduct involving moral turpitude or * * * committed or been convicted of any crime," appellant argues that the absence of any willful violation of the canons precludes the imposition of any penalty, and that he should not be penalized for things beyond his control. Appellant cites the language of R. C. 2701.12 providing for discipline of a judge for "any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the Supreme Court as would result in a substantial loss of public respect for the office," and to Section 1 of Gov. R. IV. That section reads, in part:

"* * * The Code of Judicial Conduct * * * shall be binding upon all judicial officers of this state, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V, or by retirement, removal or suspension from office, as provided in Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio."

Appellant's argument with respect to the necessity of a finding of a willful violation of the canons is not well taken. Although the commission found that appellant's acts "resulted in a substantial loss of public respect for his judicial office," the commission ordered that appellant be "retired for disability" pursuant to R. C. 2701.-12(B). Willful misconduct is obviously not a prerequisite to a finding that a judge be retired for physical or mental disability. It is equally obvious that violation of the Code

of Judicial Conduct can result from acts induced in whole or in part by a disability over which a person has no control.

Appellant's next contention is that the findings of misconduct by the commission are premised upon application of a lower standard of proof than R. C. 2701.12 and Gov. R. VI require. It is argued that: "Both ° ° ° [Gov. R. VI and R. C. 2701.12] mandate that it was incumbent for Relator to show that the alleged acts of misconduct constituting a violation of Canons '*would* result in substantial loss of public respect for the office' (Section 2701.-12) or '*would* bring the judicial office into disrepute' ([Gov. R. VI])." Appellant urges that both Gov. R. VI and R. C. 2701.12 "require that the test of probability or certainty of loss of respect for the office is not a 'slight' or 'possible' one." Appellant asserts that the commission "wrongly concluded" that: "The use of the word 'would' in both the statute and the rule are such as to require that there be clear and convincing evidence of conduct that would '*tend*' to bring the office into a disrepute or '*tend*' to result in a substantial loss of public respect."

The commission concluded that it was not necessary for the relator to "establish that the respondent's conduct would '*in fact*' result in a substantial loss of public respect or disrepute for the office." This court agrees with that conclusion.

The inclusion of the word "would" in R. C. 2701.12 adds a condition to the statute which implies that it is not necessary to show actual "loss of public respect for the office." This court is satisfied that the commission employed the proper test and that its reference to the word "tend" in determining whether appellant's actions "would result in substantial loss of public respect for the office" or "would bring the judicial office into disrepute" does not affect the validity of the conclusion reached by the commission.

Appellant contends that the evidence does not support a finding of "substantial loss of public respect for the office" by clear and convincing evidence and that the findings that he violated certain canons are manifestly against the weight of the evidence. Upon consideration of the record, particularly the conduct alluded to by the commission in its Findings and Order, this court finds these contentions to be without merit.

Appellant asserts that his actions upon which the Findings and Order of the commission are premised all relate to statements of appellant which are protected by the First Amendment to the United States Constitution and the Ohio Constitution.

Appellant cites *Garrison* v. *Louisiana* (1964), 379 U.S. 64, wherein a district attorney's conviction under a criminal defamation statute for making disparaging remarks about Louisiana judges was reversed on grounds that the statute abridged his First Amendment rights. Citing *Bates* v. *State Bar of Arizona,* 433 U. S. 350, appellant states "° ° ° it is now obvious that rules regulating the Bar or conduct of other professionals are not exempt from First Amendment scrutiny."

In rejecting appellant's free speech contentions, the commission referred to the comments of Justice Stewart in a concurring opinion in *In re Sawyer* (1959), 360 U. S. 622, 646, 647, as follows:

"° ° ° A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

The admonition contained in the Commentary to Canon 2 of the Code of Judicial Conduct is worthy of quotation here. It reads:

"Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

This court finds appellant's free speech contentions to be not well taken.

The final issue raised by appellant concerns the validity of the statutes, rules and canons under which these disciplinary proceedings have been conducted. Appellant argues that they are "unconstitutionally vague and overbroad" in violation of his due process rights.

This broad attack on the canons, statutes and rules for the discipline of judicial officers is not persuasive. Similar arguments have failed in other jurisdictions. See, *e. g., In the Matter of Del Rio* (1977), 400 Mich. 665, 256 N. W. 2d 727; Annotation 53 A. L. R. 3d 882.

The order of the commission is affirmed.

Order affirmed.

O'NEILL, C. J., HERBERT, CELEBREZZE, W. BROWN, P. BROWN, SWEENEY and STEPHENSON, JJ., concur.

STEPHENSON, J., of the Fourth Appellate District, sitting for LOCHER, J.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *City of Columbus.*	1978 TERM To wit: July 26, 1978

OHIO STATE BAR ASSOCIATION, *Appellee,* vs. JAMES J. MAYER, *Appellant.*	**No. JD 78-1** **REHEARING**

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 26th day of July 1978.

THOMAS L. STARTZMAN, *Clerk*

By SAM F. ADKINS, *Deputy*

APPENDIX C

THE STATE OF OHIO,
City of Columbus.

1978 TERM
To wit: June 28, 1978

THE OHIO STATE BAR ASSOCIATION,
Appellee,

vs.

JAMES J. MAYER,
Appellant.

No. JD 78-1

ENTRY

Upon consideration of the motion, filed by counsel for appellant, to stay execution of order and mandate pending the timely filing of an appeal to the Supreme Court of the United States, it is ordered by the court that this motion be sustained and the order and mandate of this court is hereby stayed for a period of twenty days from this date to enable counsel for appellant to apply to the Supreme Court of the United States for an indefinite stay.

It is further ordered by the court that if an indefinite stay is not issued by the Supreme Court of the United States within this twenty day period, this stay will automatically terminate and no further order will issue from this court.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page ......

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th day of June 1978.

THOMAS L. STARTZMAN, *Clerk*

By SAM F. ADKINS, *Deputy*

APPENDIX D

Supreme Court of the United States

No. A-169

JAMES J. MAYER,
Petitioner,

v.

OHIO STATE BAR ASSOCIATION

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the effect of the judgment of the Supreme Court of Ohio, in case No. JD 78-1, dated June 28, 1978 be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari. If such a petition is timely filed, this stay is to remain in effect pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this order is to terminate automatically. In the event the petition is granted, this stay is to continue pending the issuance of the mandate of this Court.

/s/ POTTER STEWART
Associate Justice of the Supreme
Court of the United States

Dated this 11th day
of August, 1978

APPENDIX E

BEFORE THE COMMISSION OF JUDGES APPOINTED BY THE SUPREME COURT OF OHIO

In re: Complaint against: JAMES J. MAYER, *Respondent,* THE OHIO STATE BAR ASSOCIATION, *Relator.*	**CASE NO. R-76-1** **Findings and Order of Commission of Judges**

This is a proceeding under R. C. 2701.11 and .12[1] and Rule VI[2] of The Supreme Court Rules for the Government of the Bar of Ohio relative to retirement, removal or suspension of a judge.

The relator is as shown in the caption. The respondent is and was at all times pertinent to this proceeding a judge of the Court of Common Pleas of Richland County, Ohio.

Pursuant to a written complaint properly executed and certified, filed by relator against respondent with the Secretary of the Board of Commissioners and Grievances and Discipline, the Board, on December 9, 1976, made the following report and certificate, to the Supreme Court of Ohio:

> "The Board of Commissioners on Grievances and Discipline, in compliance with the provisions of Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio, did, on October 28 and 29, 1976, conduct an investigation into the complaint filed by the Relator, Ohio State Bar Association, against the Respondent, Judge James J. Mayer, Richland County Common Pleas Court, alleging that cause exists for the retirement, removal or suspension from office of Judge Mayer as provided in Gov. R. VI; and R. C. 2701.12.
> "The Board of Commissioners did by the affirmative vote of 13 members, being more than two-thirds of the members of said Board, find that there is substantial credible evidence in support of the misconduct allegations as set forth in paragraph one of the complaint and do hereby report to the Supreme Court."

Thereafter, pursuant to Section 4, Gov. R. VI, and R. C. 2701.11, the Supreme Court of Ohio appointed this commission of five judges and the chairman of the commission of judges fixed a day for the hearing of the complaint.

The complaint is attached hereto as the appendix. We quote herein paragraphs 1, 2, 14 and 15 thereof:

> "1. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent engaged in the conduct hereinafter described prejudicial to the administration of justice and for the reason that Respondent engaged in the conduct hereinafter described which would bring the judicial office which he holds into disrepute.
>
> "2. Relator alleges that cause exists to remove Repondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent is suffering from a physical disability and from a mental disability and while so suffering Respondent has engaged in the conduct described below.
>
> "14. Relator says that Respondent is suffering either permanently or for an indefinite time from physical and mental disabilities which substantially impair his capacity to use self-control, judgment and discretion in the conduct of his affairs and social relations; and which will prevent, and does now prevent, Respondent from the proper discharge of the duties of his office.

"15. Relator says that the Respondent has violated Canon 1, Canon 2 A, and Canon 7 A(4) of the Code of Judicial Conduct, and Canons 4, 28 and 34 of the Canons of Judicial Ethics, and Respondent has engaged in conduct (1) prejudicial to the administration of justice in that he has created a situation in Richland County which precludes him from trying criminal cases; and (2) Respondent has engaged in conduct which brings the judicial office into disrepute in that he has publicly and privately attacked the character, motives and activities of judges, court personnel, the County Prosecutor and officers and officials of the Democratic Party of Richland County."

Prior to the hearing, respondent and relator filed several motions. Respondent's motion for an order giving him leave to dispose the persons who were grand jurors during the January 1975 term of the Richland County Grand Jury was found not well taken and overruled. Relator's motion to stay any proceedings relating to respondent's notice to take depositions was found not well taken and was overruled. The motion of relator to stay interrogatories to relator was stayed pending further order of the commission. In the briefs submitted by relator and respondent in lieu of oral argument, neither party asserts prejudicial error as a result of the commission's ruling on these motions. Other motions and rulings will be hereinafter commented on.

Pursuant to Section 5, Gov. R. VI, a hearing before the Commission of Judges was held on March 15th and 16th and on April 12th, 13th and 14th, 1977 at Columbus, Ohio.

Respondent's motion to suppress evidence obtained by Mr. Hertz or Mr. Bell, counsel for the Ohio State Bar Association, alleging that said parties obtained private information from respondent under improper methods without notice in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Section

14, Article I, of the Constitution of the State of Ohio, was orally argued on March 15, 1977, and overruled.

Thereafter evidence was adduced by relator and respondent. Respondent, now age 56, was first appointed to the Common Pleas Court of Richland County in 1959. He has been elected to three successive terms. His present term expires in 1978.

The evidence established, and the respondent in his brief candidly admits, that beginning in 1961 respondent experienced numerous health problems. In 1961 respondent contracted viral encephalitis, African sleeping sickness. Prior to 1973 he experienced increasing problems of sleeplessness and depression. He used alcoholic beverages to excess and in October of 1973 engaged in a public brawl with the manager of a Lima restaurant. Thereafter he was admitted to the University Hospital in Columbus where he was diagnosed as being a manic depressive.

Lithium carbonate was prescribed for respondent. The proper dosage was determined to be one which would maintain a blood level of Lithium at .7%. Respondent was released from University Hospital on November 15, 1973. In October 1974 respondent was advised that he had massive cancer of the large intestine. Thereafter all except the last foot of that organ was removed.

Carcinoma of the liver was also found. Respondent was released in November 1974. Thereafter, he suffered rectal and urinary incontinence, diarrhea and severe vomiting. As a result of these affilictions, respondent could not or did not maintain the required .7% Lithium level.

On May 11, 1975, respondent entered the Cleveland Clinic to undergo surgery for the removal of a portion of his liver affected by cancer. Following his release he took a variety of medication. This produced several side effects, including incontinence. Respondent's Lithium level, because of this and also a failure to take the proper dosage, was not maintained at the proper level. Respondent again returned to the Cleveland Clinic for treatment relative to

his Lithium level, diarrhea, vomiting, asthmatic and prostate problems.

The medical evidence is undisputed that surgery has probably arrested the carcinoma of the intestine and that the respondent has lived beyond the life expectancy of persons who have had surgery involving carcinoma of the liver. Further the respondent offered probative evidence that his manic depressive mental condition is controlled through the maintenance of .7% level of Lithium Carbonate in his blood.

When respondent's Lithium level is not maintained, his history, as adduced by the evidence, establishes by clear and convincing evidence that he enters into the manic or hypo manic phase of manic depression, suffers from delusions, and has paranoid symptoms. Respondent contends that since January 1976 he is properly, adequately and fully controlled and no concern should be felt for his proper handling of his judicial duties.

A majority of the Commission regretfully does not agree.

Evidence was submitted supporting by clear and convincing evidence the allegations contained in the complaint.[3] We find therefore that respondent during the period outlined above engaged in acts which violated Canon 1, Canon 2A[4] of the Code of Judicial Conduct and Canons 4 and 34 of the Canons of Judicial Ethics.[5] He has engaged in such acts as resulted in a substantial loss of public respect for his judicial office, brought his judicial office into disrepute and has engaged in conduct prejudicial to the administration of justice.

The majority disagrees with the dissent which contends that the function of this commission is to determine whether respondent's physical and mental conditions will affect his future conduct as a judge. This case is to be decided on the state of the evidence as of the date of the filing of the complaint and any amendments thereto up

to the time of trial. The commission is not to determine whether or not the respondent can function in the future as a judge by being controlled through Lithium Carbonate. The sole function of the commission is to determine whether there should be a retirement, removal or suspension as a result of finding the misconduct by clear and convincing evidence.

The majority further disagrees with the dissents on their view that the burden of proof is such that the relator must establish that the respondent's conduct would *"in fact"* result in a substantial loss of public respect or disrepute for the office. The use of the word "would" in both the statute and the rule are such as to require that there be clear and convincing evidence of conduct that would *"tend"* to bring the office into disrepute or *"tend"* to result in a substantial loss of public respect. A jury of a judge's peers can properly evaluate those things which *"tend"* to cause a substantial loss of public respect as well as those things which would bring the office into disrepute. The commission is not required to wait until those things actually happen before the judge is removed, suspended or retired. The argument that the physical and mental condition is a defense to the charges against respondent since his actions were not intentional or done purposely should also be refuted. The concern here is not with a specific mens rea or intent. It is sufficient if the conduct was improper, regardless of what may have induced or contributed to it.

The majority disagrees with the conjecture in the dissent that the commission should consider leaving this matter to the jugment of the electorate of Richland County. If that were done, the commission would be shirking its duty under the laws which it is required to enforce. In fact, the public is entitled to have the benefit of this commission's decision and can make its own judgment after having considered the decision of the commission.

Respondent has presented a battery of cases which

indicate that the conduct of some judges have been more serious than his.[6] Relator has supplied us with a number of decisions contra.[7] However, we are here to enforce Ohio standards and our statute, rules and code require high standards which are unfortunately violated. We cannot accept respondent's argument of confession and avoidance. We do find, however, that his mental and physical condition prompted his unfortunate conduct.

Respondent, during the hearing and in his brief in lieu of oral argument, made several arguments which require limited comment. A threshold question and one raised by respondent at the time of the hearing and in his brief is that, "respondent's health need not be an issue here." Respondent first argues that any charges alleging physical and mental disability were removed by the Board of Commissioners on Grievances and Discipline. See their report *supra*. Respondent's motion at the hearing to limit evidence to paragraph one of the complaint was overruled, and evidence was submitted relative to respondent's physical and mental health by both parties. We find that the Board of Commissioners did not eliminate paragraph two of the complaint nor did they have authority to do so. See Section 2, Gov. R. VI. Furthermore Section 6, Gov. R. VI is as follows:

> "If the Commission of Judges determines by majority vote that grounds for retirement, removal or suspension without pay have been established by clear and convincing evidence as alleged in the complaint or as provided in R. C. 2701.12, the Commission of Judges shall make such order as in its judgment is necessary and proper. Notice of any order so made shall be sent by registered mail with return receipt to the Judge against whom the finding has been made and the Supreme Court."

This paragraph permits the Commission of Judges to consider grounds for retirement, removal or suspension, if established by clear and convincing evidence as alleged

in the complaint, *or* as provided in R. C. 2701.12. See also Section 5, Gov. R. VI. As set forth above, R. C. 2701.12(B) provides for retirement of a judge from office for a permanent physical or mental disability which prevents the proper discharge of the duties of his office.

Respondent also contends that: "The actions of which Relator complains involve speech which is protected by the First Amendment to the United States Constitution and the Ohio Constitution." We find this contention without merit. Such a contention would effectively eliminate removal from office of all judges except those whose conduct involves moral turpitude or unlawful conduct. In *Spencer* v. *Dixon* (1968), 290 F. Supp. 531 the court stated at 537:

> "This court has been referred to no case of any appellate tribunal or court of original jurisdiction which ever has interdicted as unconstitutional the contempt authority of a court to punish irrelevant, insulting, abusive, or grossly discourteous language in criticism of a judge or officer of the court in a pleading filed with the court. It is our irrevocable view that such language contains no constitutional protection and so has been held by definite opinions of appellate tribunals, especially by the Supreme Court of the United States."

Justice Stewart has set forth a noteworthy standard in his concurring opinion in *In Re Sawyer* (1959), 360 U. S. 622, 646-647:

> "° ° ° A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. ° ° °"

Respondent also asserted that statements in his pleadings and brief in State of Ohio v. James J. Mayer originating as a result of Lynn Seamon v. R. C. White were privileged and therefore not admissible. It was and is the ruling of this commission that in a proceeding of this type the statements above referred to are admissible. Cf. *Duke v. Comm. on Grievances* (1936), 82 F. 2d. 890, cert. den. 298 U. S. 662; *In Re: Estes* (1959), 94 N.W. 2d 916, cert. den. 361 U. S. 829; compare generally 12 A. L. R. 3rd. 1408-1420.

Respondent's contention that "[t]he Ohio Constitution prohibits the imposition of any discipline of Respondent on the basis of Governing Rule VI (1) (c)," is without merit. Also, respondent's contention that "[t]he statute, rules and canons which Relator alleges are grounds for discipline are unconstitutionally vague and overbroad, in violation of Respondent's due process rights," is not well taken. See *Matter of Edens* (1976) 226 S. E. 2nd 5; *Matter of Del Rio* (1977), 400 Mich. 665, 256 N. E. 2d 727; Anno. 53 A.L.R. 3d 882.

Keeping in mind that a judge's official conduct should be free from impropriety and the appearance of impropriety, and his personal behavior, not only on the bench and in the performance of judicial duties, but also in his every day life should be beyond reproach, and that Gov. R. VI should be liberally construed for the protection of the public, this commission finds by clear and convincing evidence that there are grounds for the retirement of the respondent, James J. Mayer, for the reasons that he has a physical and mental disability which prevents the proper discharge of the duties of his office. It is the order of this Commission that pursuant to R. C. 2701.11 and .12 and Gov. R. VI, the Respondent, James J. Mayer be retired for disability as a Judge of the Court of Common Pleas of Richland County, Ohio with the right to any emoluments, benefits and compensation allowed by law.

The execution of the foregoing order is hereby stayed for a period of twenty days following entry of the order.

Ford, J.; Mahoney, J. and Potter, J. concur.

ROBERT B. FORD
Robert B. Ford

EDWARD J. MAHONEY
Edward J. Mahoney

JOHN W. POTTER
John W. Potter

Kerns, J. and Tyack, J., concur in part and dissent in part.

JOSEPH D. KERNS
Joseph D. Kerns

GEORGE TYACK
George Tyack

ATTEST:

COIT H. GILBERT
Secretary

Footnotes

[1] "2701.11 Rules for retirement, removal and suspension of judges; appointment of commission.

Subject to rules implementing sections 2701.11 and 2701.12 of the Revised Code, that shall be promulgated by the supreme court, upon written and sworn complaint setting forth the cause or causes and after reasonable notice thereof and an opportunity to be heard, any judge may be retired for disability, removed for cause, or suspended without pay for cause by a commission composed of five judges of this state, all of whom shall be appointed by the supreme court from among judges of the courts of record located within the territorial jurisdiction in each of any five of the appellate districts, not including that within which the respondent judge resides.

Such a commission shall be appointed by the supreme court upon receipt of a report of its board of commissioners on grievances and discipline that such board has received a written and sworn complaint alleging that cause exists for retirement, removal, or suspension of a judge under section 2701.12 of the Revised Code, and that upon investigation and a finding by at least two-thirds of the members of such board that there is substantial credible evidence in support of such complaint. Any judge so retired, removed, or suspended may appeal, on the record made before the commission, from the commission's action to the supreme court. The commission, the court, or a judge thereof may stay execution of an order pending disposition of an appeal. The court may affirm, reverse, or modify the order of the commission.

Members of the commission shall be reimbursed from the state treasury for their actual and necessary expenses in connection with their service on the commission.

The administrative assistant of the supreme court shall be the secretary of each commission appointed to consider retirement, removal, or suspension of a judge. The secretary shall certify each order of a commission which commands the retirement, removal, or suspension of a judge to the governor, the chief justice of the supreme court, and the officer required by law to draw warrants for payment of the salary of such judge.

Upon request of any such commission, the attorney general shall assist in the performance of its duties."

"2701.12 Retirement, removal or suspension of judge.

"(A) Cause for removal or suspension of a judge from office without pay under section 2701.11 of the Revised Code exists when he has, since first elected or appointed to judicial office:

Footnotes – Continued

"(1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;

"(2) Been convicted of a crime involving moral turpitude; or

"(3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occuring before such election or appointment.

"(B) Grounds for retirement of a judge from office for disability exist when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office.

"(C) Grounds for suspension without pay of a judge from office for disability exist when he has a physical or mental disability which will prevent the proper discharge of the duties of his office for an indefinite time."

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[2] "1. (a) The written and sworn complaint required by R. C. 2701.11 shall be filed with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court heretofore established under Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, who shall transmit such complaint to the Chairman of the Board. Six copies of the complaint shall be so filed. The complaint shall set forth specifically the grounds claimed to be cause for retirement, removal, or suspension of the Judge from office and time when and place where any act, acts, omission or omissions occurred which are alleged to be cause for such retirement, removal or suspension under R. C. 2701.12. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the relator) and supported by a certificate in writing, signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local Bar Association in the state (which association shall be deemed the relator), certifying that such counsel is duly authorized to represent the relator in the premises and has accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the relator believes that reasonable cause exists

Footnotes – Continued

to warrant a hearing on such complaint and shall constitute the authorization of such counsel to represent the relator in the premises as fully and completely as if he or they were designated and appointed by order of the Supreme Court of Ohio, with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved by the acts or omissions of the Judge against whom the complaint is filed.

"(b) A judge is disqualified from acting as a judge while there is pending an indictment or any information charging him in the United States with a crime punishable as a felony under state or federal law.

"(c) In addition to the cause for removal or suspension of a judge, as provided in R. C. 2701.12, a judge may be removed or suspended from office if he is engaged in wilful and persistant failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute, or if he has been indefinitely suspended from the practice of law or permanently disbarred.

"2. Upon receipt of such written and sworn complaint by the Chairman of the Board of Commissioners on Grievances and Discipline of the Supreme Court, he shall, as soon as practicable, convene such Board and present to it the complaint. The Secretary of the Board of Commissioners shall send a copy of such complaint to the Judge against whom the complaint is made. The Board shall then proceed to investigate the complaint. After completion of this investigation, if two-thirds of the members of such Board affirmatively determine that there is substantial credible evidence in support of the complaint, the Secretary of the Board of Commissioners shall certify to the Supreme Court the result of such investigation. The investigation conducted by the Board of Commissioners shall be private. The Board shall have authority to issue subpoenas for such witnesses as are deemed necessary. Subpoenas may be signed by any member of the Board or the Secretary.

"3. The report of the Board of Commissioners on Grievances and Discipline shall be sent by certified mail to the Judge against whom the complaint is made at the same time such report is sent to the Supreme Court.

Footnotes – Continued

"4. The Supreme Court shall, if the report finds there is substantial credible evidence in support of such complaint, appoint within a reasonable time after its receipt a Commission of five Judges, as provided in R. C. 2701.11.

"5. The Chairman of the Commission of Judges appointed to determine the question of retirement, removal or suspension of a judge shall be designated by the Supreme Court. Such Chairman shall promptly after receipt of the notice of his appointment and the receipt of the complaint fix a day for the hearing. Such hearing shall not be in the county seat of the county in which the Judge complained about resides unless requested by the Judge against whom such complaint is made. The Chairman shall determine, in the absence of such request, the place and time of the hearing. The hearing shall be private, with full opportunity for relator and respondent to present witnesses.

"6. If the Commission of Judges determines by majority vote that grounds for retirement, removal or suspension without pay have been established by clear and convincing evidence as alleged in the complaint or as provided in R. C. 2701.12 the Commission of Judges shall make such order as in its judgment is necessary and proper. Notice of any order so made shall be sent by registered mail with return receipt to the Judge against whom the finding has been made and the Supreme Court.

"7. Mental disability shall mean the condition defined in R. C. 5122.01 (A) which presently prevents the proper discharge of the Judge's duties.

Physical disability shall mean the impairment of the faculties of a Judge, which has prevented the proper discharge of his judicial duties for more than six months. Failure to be present in Court or to perform usual judicial functions for six months or more shall raise a presumption of physical disability.

The Commission shall make such determination of disability based upon the testimony adduced before it. Expert medical testimony may be received by the Commission, and it may name medical experts to examine the respondent, with his consent.

"8. Any Judge so retired, removed, or suspended may appeal to the Supreme Court on the record made before the Commission of Judges from the action of the Commission. Notice of such appeal shall be given by the Judge to the Commission of Judges and the

Footnotes – Continued

Supreme Court within 20 days after his receipt by registered mail of the findings made by the Commission. Thereafter, the time for filing a transcript of testimony, briefs, and the conduct of a hearing shall be as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

"9. When a Judge who has been suspended by reason of physical or mental disability wishes to apply for reinstatement, he may do so by filing a petition with the Board of Commissioners on Grievances and Discipline, setting forth the facts which support the alleged restoration to health. This petition will be processed in the same manner as a complaint.

"10. The Commission of Judges may take testimony in any manner prescribed by the law of the state of Ohio. All rules of evidence shall be observed in the conduct of hearings before the Commission of Judges. The parties may be represented by counsel.

"11. The Commission of Judges shall issue subpoenas for witnesses under the seal of the Supreme Court, signed by a member of the Commission of Judges or the Secretary of the Commission.

The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm or to answer any proper question shall be deemed contempt of the Supreme Court, and such person shall be punished accordingly.

"12. Costs and expenses herein incurred by the Board of Commissioners and the Commission of Judges shall be paid from the Admissions and Grievance Fund of the Supreme Court, and the Court may order that such fund be reimbursed by the respondent if the proceding terminates in retirement, removal or suspension without pay.

"13. This Rule and such regulations relating to investigations and proceedings involving complaints and petitions for reinstatement shall be liberally construed for the protection of the public and the Courts and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the adoption of this Rule."

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[3] Inter alia the respondent in letters, in a brief which he prepared, duplicated and disseminated 25 copies, in conversations and

Footnotes – Continued

at public meetings referred to a fellow judge as a liar, a cruel saddist, as the Godfather, as part of the Gilligan Mafia, a.k.a. the Dirty Dozen, that the Prosecuting Attorney of the county belonged to the Mafia and was incompetent. Respondent accused a fellow judge and Democratic official of improper handling of fiscal matters and tried to institute a grand jury investigation of Richland County Democratic officials. Forty-five affidavits of prejudice in criminal matters were filed and granted against the Respondent. He does not now hear criminal cases when there is a jury except in an emergency.

Although respondent's actions have not resulted in criminal action, lewd or lascvious behavior or in the illegal or improper loss of liberty or property of those who appeared before him, his use or attempted improper use of the grand jury can be compared to the actions of Franko in *Mahoning County Bar Association* v. *Franko* (1958), 168 Ohio St. 17.

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[4] "Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary.

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

"Canon 2 A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

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[5] "Canon 4. Avoidance of Impropriety.

"A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

"Canon 34. A Summary of Judicial Obligation.

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of

Footnotes – Continued

public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."

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[6] Cited by respondent:

In Re Larkin (1975), 333 N. E. 2d 199 (Judge made a serious error of judgment involving extrajudicial conduct with respect to attempted election campaign contributions, warranted censure of judge and order that he pay $15,000 as costs in the proceeding).

Cannon v. *Comm. on Judicial Qualifications* (1975), 537 P. 2d 898 (Judge was found to have in bad faith, with maliciousness, and arbitrarily ordered the immediate incarcerations of deputy public defenders who displeased her, and denied the effective right of counsel to their clients who were required to defend against charges in on-going criminal proceedings with substituted counsel who were afforded no reasonable opportunity to prepare. She also used intemperate language. The judge was removed.)

In Re Emmett (1974), 300 So. 2d 435, headnote 4:

"While judge's act of sending letters to criminal appeals court judges outlining reasons for setting high bonds in cases of individuals who had just been indicted and expressing hope that they would view case in same light, without sending copy of letters to defendants or their counsel, was improper, there was nevertheless, no clear and convincing evidence of unlawful behavior of judge shown which would constitute misconduct in office since judges to whom letters were sent were never called upon to review amount of bail bonds and no defendant was actually prejudiced by writing of letters.

In Re Gerald S. Chargin (1970), 87 Cal. Rptr. 709 (Judge, during the course of a juvenile court hearing over which he presided, made certain improper and inflammatory remarks reflecting upon the juvenile's family and members of his ethnic group. Judge was censured).

Footnotes – Continued

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[7] Cited by relator:

Cincinnati Bar Assn. v. *Heitzler* (1972), 32 Ohio St. 2d 214, cert. den. 411 U. S. 967. (Judge was indefinitely suspended from the practice of law due to his personal activity of going on a trip with a girl friend while he was married to another woman and entering into business relations which could bring his personal interests into conflict with the impartial performance of official duties).

Mahoning County Bar Assn. v. *Franko* (1958), 168 Ohio St. 17, cert. den. 358 U. S. 932 (Respondent did not resign his judicial position while a candidate for prosecuting attorney and misused his judicial powers during the campaign. The judge was suspended indefinitely).

In Re Ryman (1975), 323 N. W. 2d 178 (Giving false testimony before master conducting hearing on charges of misconduct, continuing the practice of law after assuming judicial office and causing the deputy clerk of judge's court to perform duties of magistrate without compliance with statutory requirements for appointment of magistrates would constitute conduct clearly prejudicial to the administration of justice and would warrant judge's removal from office).

McCartney v. *Commission on Judicial Qualifications* (1974), 526 P. 2d 268 (Judge, at times, became an "advocate" in proceeding and had delegated a non-judicial officer to power to impose punishment constitutionally vested in the judiciary. Judge was censured but not removed, due to his inexperience and attempts to "do justice").

Geiler v. *Commission on Judicial Qualifications* (1973), 515 P. 2d 1, cert. den. 417 U. S. 932 (Use of vulgar language in dealing with professional associates, employees, and officers of the court constitutes "conduct prejudicial to administration of justice". The judge was removed from the bench).

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:

Compıaint against:

JAMES J. MAYER, Judge,
Richland County Court of
Common Pleas
Richland County Courthouse
Mansfield, Ohio 44902,

Respondent,

THE OHIO STATE BAR
ASSOCIATION,
33 West Eleventh Avenue
Columbus, Ohio 43201,
Relator.

Case No. R-76-1

Report and Certificate of The Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

The Board of Commissioners on Grievances and Discipline, in compliance with the provisions of Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio, did, on October 28 and 29, 1976, conduct an investigation into the complaint filed by the Relator, Ohio State Bar Association, against the Respondent, Judge James J. Mayer, Richland County Common Pleas Court, alleging that cause exists for the retirement, removal or suspension from office of Judge Mayer as provided in Gov. R. VI; and R. C. 2701.12.

The Board of Commissioners did by the affirmative vote of 13 members, being more than two-thirds of the members of said Board, find that there is substantial credible evidence in support of the misconduct allegations as set forth in paragraph one of the complaint and do hereby report to the Supreme Court.

We, the Chairman and Secretary, do certify that the foregoing report truly reflects the result of the investigation of the complaint against Judge James J. Mayer and do hereby report the same to the Supreme Court.

December 9, 1976.

ATTEST:

ROBERT F. MOULTON
Chairman, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

COIT H. GILBERT
Secretary, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:

Complaint against

HON. JAMES J. MAYER
Judge, Court of
Common Pleas
Richland County
Mansfield, Ohio 44092

Respondent

OHIO STATE BAR
ASSOCIATION
33 West 11th Avenue
Columbus, Ohio 43201
Relator

No. R-76-1

SWORN COMPLAINT AND CERTIFICATE (Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio)

1. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent engaged in the conduct hereinafter described prejudicial to the administration of justice and for the reason that Respondent engaged in the conduct hereinafter described which would bring the judicial office which he holds into disrepute.

2. Relator alleges that cause exists to remove Respondent from office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent is suffering from a physical disability and from a mental disability and while so suffering Respondent has engaged in the conduct described below.

3. Respondent has been in ill health since 1961, when he became ill due to viral encephalitis. He has never fully recovered from that illness. In 1962, Respondent suffered depression and was hospitalized. In 1966, Respondent again suffered depression due to encephalitis and was admitted to Upham Hall of Ohio State University Hospital. He was released in 1966, although still ill. In 1967, Respondent developed insomnia and was admitted to Mansfield General Hospital and then again to Ohio State University Hospital.

4. In 1968, Respondent again assumed the bench and from 1968 to 1972, he developed an addiction to the use of prescription drugs. From 1968 to October 1974, for various periods of time, Respondent was admitted to St. Rita's Hospital, Lima, Ohio, and to Ohio State University Hospital.

5. In October and November 1974, Respondent was admitted from time to time to Cleveland Clinic where he was also an outpatient. Respondent was twice operated for malignancy in Cleveland Clinic in 1974, and thereafter, commenced a course of chemotherapy which was completed in December 1975.

6. In about August 1973, and continuing thereafter, Respondent wrote numerous letters and other documents and made public statements printed in the newspapers in which he alleged various conspiracies among the judges, court personnel, public officials, officers of the Democratic Party and others in Richland County, and officers and officials of the State of Ohio, to harm the Respondent so as to cause him to be removed from office or to discredit his reputation. By his written and oral statements, Respondent has made himself a public issue.

7. On August 22, 1973, Respondent wrote to Judge Richard M. Christiansen, Court of Common Pleas, Probate Division, Richland County, requesting Judge Christiansen

to take over as Common Pleas Judge supervising a Grand Jury investigation of the Democratic Party of Richland County, and to try all criminal cases arising from the investigation. Respondent alleged, in part, that

> "The pattern of misuse of a public trust and the Democratic Party for private advantage and gain for a period of time that extends back to the early '60's through May of '73 is so unbelievably gross, wicked and dishonest that if exposed fully will, in my opinion, make Watergate, Crofters and the Perfuma incident in England tea parties by comparison."

8. On October 4, 1973, Respondent again wrote to Judge Christiansen in part as follows:

> "This will advise that as a friend I would like to request that you select the best foreign lawyer you can find, as 80% of our Bar hates your guts and I would not trust anyone who you are not positive is very close to you to give you any advice. I will be in touch with you Tuesday in person or by letter with full details of your problem.
>
> "As a clue, the people in Shelby think you are using your office, particularly the lunacy section of your court, to falsely accuse me of being a lunatic and/or driving me to it as they are fully familiar with the fact that you were the architect of the fiasco that was to be an orderly John Glenn party. They were so angry that it is entirely possible that someone will do you personal violence.
>
> "The lawyers on the other hand feel you are practicing law while you are a judge as well as using your office because you are jealous of my success and want to harm me and because Governor Gilligan has made you part of the team that persecuted and tried to bury the All American Boy, John Glenn.
>
> "These are minor problems you have. May I suggest as an old and dear friend that after the first of the week you go to Canada, Mexico or even to Europe, give your lawyer my name and have him contact me personally. Make arrangements so we can keep you advised."

9. On October 5, 1973, Respondent wrote to Judge Ralph E. Johns, Court of Common Pleas, Division of Domestic Relations, Richland County, in part, as follows:

> "You think this letter is to apologize for rudely beating on your door, I am going to tell you you had it coming and I do not intend to apologize.
>
> "Since I have someone in every office in the courthouse who is more loyal to me than to their employer, it has been reported to me that you have made the following observations: 1. Gilligan is a great guy because he signed your pay raise. 2. Donald Kindt is your friend. 3. You have spoken in friendly terms concerning Donald Hout. 4. You think you took Dave Walker away from Judge Christiansen. I have news for both of you, he is a better friend of mine than either of you.
>
> "I find it necessary to teach you respect for the senior judge, so, the above Governor who hates me will be calling on me at my office or he is the dumbest man in America; Kindt thinks Joe Seifert gave him just cause to suspend him while, in fact, I created the situation for that purpose. He further thinks Judge Puglisi is a better friend of his than mine because he got the Governor to change his mind about appointing Bob Lett. Etc. ° ° °.
>
> "To get even with me Kindt has been telling all these people that I am mentally unbalanced. He has gotten so excited about his lie that now he is boldly calling friends in Shelby, who have witnesses on an extra phone, in their home, telling them of my lunacy. ° ° °
>
> "I am tired of playing with Kindt as he not only slanders me per se but encourages his friends to spread rumors. I am not going to break his friends with civil suits but if you shove me further, I will him.
>
> "Now I am going to teach you a lesson because I am tired of people telling me how to run my life as I just want to be a judge, raise my family and be left alone. I am going to teach your Governor manners; I am going to teach Mr. Kindt manners and I am going to teach Mr. Hout manners.

"Fortunately Walker is my friend or I would include him. When I get through, you are the one who is going to crawl on your belly and apologize to me for fear you will be next, etc."

10. For the January 1975 term, Respondent presided over the Grand Jury. At that time, in Richland County, the judge who presided over the Grand Jury was assigned all the cases arising out of action by that Grand Jury. Respondent appointed Louise Bush as forelady of the Grand Jury. After her appointment, in February 1975, Respondent called her into his chambers and instructed her that without the knowledge of the County Prosecutor and anyone else except the necessary personnel in the Clerk's and Sheriff's offices, she was to initiate an investigation of the Richland County Democratic Party and particularly an investigation of its finances. Respondent gave the forelady a list of persons to be served with subpoenas. On or about February 28, 1975, Respondent also conferred with the Sheriff of Richland County and his deputy, relative to their serving the subpoenas and relative to their obtaining a search warrant to secure the contents of a safe deposit box allegedly owned by the Democratic Party. These instructions included among other things, a list of municipal court judges from whom the Sheriff should solicit the search warrant. Respondent impressed the burden of secrecy on all persons involved. Respondent also instructed the forelady to deposit all property secured by the search warrant in a special location in the Respondent's chambers.

11. In August, 1975, Respondent heard an habeas corpus action with respect to one Lynn Seaman, an inmate in the Ohio State Reformatory who had been convicted and sentenced for possession of marijuana. Respondent granted the writ, with conditions, on August 12, 1975. A motion for reconsideration was filed. In his Opinion and Journal Entry overruling the motion for

reconsideration, Respondent made a personal attack on the Prosecuting Attorney, William F. McKee, and the manner in which he conducted his public office. Thereafter, Prosecutor McKee filed a Petition for Writ of Prohibition in the Court of Appeals for Richland County seeking to prohibit Respondent from carrying into effect his order granting the writ of habeas corpus. Respondent filed a Motion to Dismiss in the Court of Appeals and a Petition and Brief in Prohibition in the Supreme Court of Ohio. In each of these pleadings, motions and briefs in the prohibition actions, the Respondent made viscious personal attacks on Prosecuting Attorney McKee; and in Respondent's Motion and Brief to Dismiss in the Court of Appeals, Respondent again details at great length the alleged political conspiracies to oust him from office, and made vicious personal attacks against the alleged co-conspirators Donald Hout, Vice Chairman of the Democratic Party; Prosecuting Attorney William F. McKee; Judge Richard M. Christiansen and his wife; and Donald Kindt.

12. In December 1975, and the first quarter of 1976, Prosecuting Attorney William F. McKee filed some forty-five (45) affidavits of prejudice against the Respondent. All have been granted by the Chief Justice of the Supreme Court. In his position as Judge of the Court of Common Pleas of Richland County; and 2) there has been a failure to establish by the relator by clear and convincing proof that the respondent has acted in a manner to cause a substantial loss of public respect for the office to which he has been elected.

This Commission of Judges should dismiss the charges filed against the Respondent.

GEORGE TYACK

George Tyack

NOW, THEREFORE, Relator says that Respondent should be retired, removed or suspended from office as provided in Gov. R. VI, and Section 2701.12, Revised Code of Ohio.

JOHN R. WELCH

John R. Welch
33 West 11th Avenue
Columbus, Ohio 43201

HARLAN S. HERTZ

Harlan S. Hertz
1020 Leader Building
Cleveland, Ohio 44114

ALBERT L. BELL

Albert L. Bell
33 West 11th Avenue
Columbus, Ohio 43201

EUGENE BALK

Eugene Balk
First Federal Building
Southwyck Blvd.
Toledo, Ohio 43614

Counsel for Relator

Counsel for Relator

CERTIFICATE

The undersigned, Thomas E. Palmer, Chairman, of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association hereby certifies that Harlan S. Hertz, Eugene Balk, John R. Welch and Albert L. Bell, are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

DATED August 17, 1976

THOMAS E. PALMER

Chairman
(Title)

STATE OF OHIO }
CUYAHOGA COUNTY } SS:

I, Harlan Stone Hertz, being first duly sworn, depose and state as follows:

1. I am an Attorney at Law admitted to practice before the Supreme Court of Ohio.

2. I am a member of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

3. In pursuit of my responsibilities as a member of said Committee I, among others, have made an investigation of complaints referred to said Committee concerning the conduct of Judge James J. Mayer.

4. I participated in the preparation of the foregoing Complaint; and based upon such investigation and based upon my review of documentation available to me I believe the allegations set forth in the foregoing Complaint to be true.

HARLAN STONE HERTZ

Harlan Stone Hertz

Sworn to before me at Cleveland, Ohio this 30th day of July, 1976.

LAWRENCE J. FRIEDMAN

Notary Public

LAWRENCE J. FRIEDMAN, Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

OHIO STATE BAR ASSOCIATION,
Relator,
vs.
JAMES J. MAYER,
Respondent.

CASE NO. R-76-1

KERNS, J. dissenting in part and concurring in part:

As shown by the undisputed evidence presented at the hearing of this matter, the respondent, James J. Mayer, has served as Judge of the Court of Common Pleas of Richland County with honor and distinction for almost eighteen (18) years except for brief periods during recent years when he was plagued with serious illness.

From the opening statement to the final briefs, the theme of the case has been woven around the unfortunate maladies which attacked the respondent and caused the conduct alleged in the relator's complaint. In fact, the medical and psychiatric evidence upon the respondent's condition stands undisputed in the record.

Although impressed with some conflict, the record fails to show by clear and convincing evidence any misconduct by the respondent in the performance of his judicial duties, and even assuming that the intemperate remarks made by him outside of court and upon a variety of subjects are not entitled to constitutional protection, I still cannot subscribe to the opinion of the majority that the so-called defense of "confession and avoidance" is without merit. On the contrary, the natural imperfections of humanity are inherent in all rules and laws, and no man, regardless of his station in life, should be held responsible for acts or conduct over which he had no control. Accordingly, there is no basis in law, and no support from the evidence under any circumstances, for the removal or suspension of the respondent under R. C. 2701.12(A).

The question remains, however, as to whether the record discloses grounds for retirement under the provisions of R. C. 2701.12(B), because as expressly found in the majority opinion, and as candidly admitted by the respondent in his opening statement, the issue of disability is of paramount importance in this case.

The respondent argues that his condition can be fully controlled by the maintenance of a proper Lithium level, and there is expert evidence in the record to support this conclusion, but unfortunately, the undisputed evidence also reveals that the respondent's proper Lithium level is at all times subject to and dependent upon the unpredictable potential of a carcinoma of the liver and the uncertain nature of a cancer of the large intestine.

In other words, it is the respondent's physical condition rather than his Lithium level which portends the future, as it has controlled the past, and upon this tenuous factual foundation, the respondent must necessarily rest his defense.

The extensive evidence of "local politics" in the record recommends extreme caution, and some further hesitancy is prompted by the realization that the people are the real, if not the only, parties in interest, and that we are to some extent invading the right of the people to choose the judge or judges they would have represent them.

Under such circumstances, some members of this Commission probably would prefer to delegate their task to the citizens of Richland County at the elections to be held in 1978. In fact, this practical solution is worthy of consideration because regardless of the action taken by this Commission, the appellate process will consume more time than remains of the respondent's present term.

Upon the whole record, however, our duty at this time is clear. I respectfully dissent from the majority finding that the respondent was responsible for a substantial loss of public respect for his judicial office or purposely

did anything prejudicial to the administration of justice, but I concur in the opinion that the respondent's physical condition is such as to warrant his retirement for disability with a vested right to any emoluments, benefits, and compensation allowed by law.

JOSEPH D. KERNS

Joseph D. Kerns

OHIO STATE BAR ASSOCIATION, *Relator,*	**CASE NO. R-76-1**
vs.	
JAMES J. MAYER, *Respondent.*	**OPINION**

TYACK, J. Dissenting in part and concurring in part.

I concur with the decision of the other Judges on this panel notwithstanding the rather peculiar Report and Certificate of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio under date of December 9, 1976. "The Board of Commissioners did by the affirmative vote of thirteen members, being more than two-thirds of the members of said Board, find that there is substantial credible evidence in support of the misconduct allegations as set forth in Paragraph one of the Complaint and do hereby report to the Supreme Court."

Paragraph One of the Complaint and Certificate as filed September 16, 1976, reads:

> "Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio, for the purpose that Respondent engaged in the conduct hereinafter described prejudicial to the administration of justice and for the reason that Respondent engaged in the conduct hereinafter described which would bring the judicial office which he holds into disrepute."

This then raised the question as to the applicability of Paragraph two of the sworn Complaint and Certificate referring to a "physical disability and a mental disability." Due to the modification in the Report and Certificate of the Board of Commissioners on Grievances and Discipline, the question was raised as to the right of the Commission

of five Judges to consider the matter of retirement for physical reasons. Apparently the Judges unanimously agree that the right to consider the matter of retirement for physical reasons is before the commission. They further unanimously agree that they have jurisdiction to consider the matter of retirement for physical reasons.

Other than concurring upon the matter of the right of the Commission of Judges to consider and require the retirement for physical reasons, I respectfully dissent from my fellow Judges in their findings and decisions.

As to the findings of the other Judges on the matter of physical disability, this member of the commission does not believe that the physical disabilities which would interfere with the future conduct of the respondent's office have been established by clear and convincing evidence. There is no question from the evidence and from the statements of the respondent that he has had a long history of extremely serious physical and mental problems. The issue is whether such physical and/or mental problems interfered with the proper conduct of his position of the Judge of Common Pleas of Richland County and what the prognosis would be as to his future ability to cope with the position as Judge. From the medical evidence, as this member of the Commission of Judges understood it, while there is a chance that failure to keep a proper Lithium balance could result in problems, the testimony of the physicians was to the effect that the respondent was maintaining the Lithium balance and that the prognosis for continued control through such chemical was good. While this member of the commission realizes that there is a certain risk in any medical prognosis, his opinion is that the inability to handle the position in the future must be established by clear and convincing evidence. This member feels that it has not been so established.

By way of comment, the testimony which was, to put it mildly, lengthy, in my opinion, failed to establish that the many physical and/or mental problems which respond-

ent had did affect his efficiency as a judge. Granted there was a period of time he could not be on the bench and granted further that for a period of time he operated under extreme difficulties, the fact remains that the overwhelming evidence presented by the respondent at the hearing indicated he was doing not only an acceptable job as judge but an outstanding job. This member of the Commission of Judges realizes that at least for a period of time and probably even up to the present date, the respondent has not been hearing criminal cases. This member is entirely at a loss to understand why the respondent is not assigned criminal cases the same as any other judge. For a short period of time, it may have been that the relationship between the prosecuting attorney and the respondent may have been something less than pleasant; the fact remains that the assistant prosecutor who testified surely did not indicate that the respondent was anything less than capable and fair in his judicial conduct as it related to the criminal docket. (This member is of the opinion that some indiscreet statements were made in the various briefs filed by the respondent in the action involving one Lynn Seaman wherein the respondent granted a writ of habeas corpus.) By way of comment, it is interesting to note that at least in granting the writ of habeas corpus, the respondent expressed an opinion that was shared by many concerning the severity of sentences in marijuana type cases. It is also interesting to note that in the subsequently enacted Drug Control Act the severity of the sentences has been greatly modified and brought in line with the respondent's thinking. Granted that for the purpose of this decision that statements contained in the briefs and/or memoranda filed by the respondent were intemperate and further for the purpose of this decision not privileged, there is still the issue of whether or not such conduct constituted a violation of the Canons of Judicial Conduct as would result in *substantial loss of public respect for the office*. This Judge's observation is

that there was no evidence presented to indicate in the two year period from the time of the writ until the time of the hearing before this commission, any substantial loss of public respect for the office. Certain observations were made concerning the grand jury conduct as it related to the matter of the claim by the respondent of m. handling of funds by officers of the Democratic party one accepts the philosophy of the relator, a perso becoming a judge divorces himself from any responsibility of reporting or at least setting into motion procedures to bring offenders to trial. Granted that in retrospect, other steps might have been taken rather than the request for investigation by the grand jury, this Judge wonders how this matter could have been brought to light except by the manner utilized by the respondent. As evidenced by the multiple reports from the sheriff's office; the conduct of the prosecuting attorney; the obvious leaks from the grand jury proceedings; the "unavailability" of the key witness; it would appear that any attempt would have been an exercise in futility. This member of the Commission of Judges would comment that the respondent had the power to issue a search warrant and, yet, did not do so but had the matter attempted through other judges. Even if these matters were questionable, as to the method utilized, the issue still arises whether such conduct would be a violation of the Judicial Canons and whether they would result in a substantial loss of public respect for the office as required by R. C. 2701.12. On the contrary, it is equally reasonable to believe that the stature of the office of judge could have been increased by the conduct of the respondent. Many people would believe that it added prestige to the office for a judge to have sufficient courage to bring to light or attempt to bring to light improper activities on the part of political figures. This member of the commission believes the likelihood of adding to the stature to the judicial position is greater than the possible detriment. Of all the witnesses who testified, only one,

who seemed to have somewhat of a favorable inclination toward the prosecuting attorney, indicated that the position of judge had been in any way impaired.

Without commenting upon the merit or lack of merit of the respondent's knowledge concerning the allegations as to the party officials, there was no evidence presented that would indicate any charges or lawsuits having been filed claiming defamation of character. The surrounding circumstances, namely, the sudden "vacation" of the key witness; the threats by the prosecuting attorney of criminal charges; the "leaks" from the grand jury proceedings; the several varied reports from the sheriff's office, may well have increased the stature of the respondent's position. Under any circumstance, this member of the Commission of Judges does not believe there has been any clear and convincing evidence to support any "substantial loss of public respect for the office."

In summary, this judge strongly feels that the findings of the majority of the Commission of a violation of the Canons of Judicial Conduct has not been supported by clear and convincing evidence. In fact, the relator has permitted itself to be used as a political tool to attempt to remove a judge of many years outstanding judicial service. This Judge feels that the record is virtually void of any *proof* of substantial loss of public respect for the office. Granted R. C. 2701.12 deals with "the office," this judge feels that there has not even been evidence to support a loss of public respect for the respondent. This judge would respectfully point out that here is a judge who has been elected and re-elected, sometimes without opposition; who from all the testimony maintained the respect of the Bar and his constituents; who was dedicated in his work and worked under physical handicaps that would have made a lesser person give up. This judge would also point out that the respondent's term expires in approximately one year. He will have to be filing for

the primary within approximately a month. If there has been a loss of respect, either for the respondent or his office, it would appear that the matter will be resolved within a matter of days by the electorate. This Judge feels strongly that whether the respondent continues in his office as judge should be left to the people whom he has served these many years. If they feel he has lost respect or has caused a "substantial loss of public respect for the office," this entire matter will be self-resolving. For this Commission of Judges to rule otherwise would be to attempt to deprive the electorate of Richland County of their right to speak. This judge of the commission reiterates his position that: 1) there has been a failure to show by sufficient degree of proof the inability for physical and/or mental reasons of the respondent to continue the briefs and letters filed by the Respondent with the Supreme Court pertaining to those affidavits, the Respondent again made vicious personal attacks against Prosecutor McKee.

13. The Mansfield News Journal has published articles pertaining to the public allegations by the Respondent against Judge Richard M. Christiansen, Donald J. Kindt, Ronald Hout, Jack Davis, and Prosecuting Attorney William F. McKee. The public is therefore informed of the political conspiracies alleged by the Respondent, of the Respondent's charges involving the Democratic Party officers, of Respondent's ill health, of Respondent's charges against Prosecutor McKee and of Respondent's disqualification by the Supreme Court to hear all assigned criminal cases.

14. Relator says that Respondent is suffering either permanently or for an indefinite time from physical and mental disabilities which substantially impair his capacity to use self-control, judgment and discretion in the conduct of his affairs and social relations; and which will prevent,

and does now prevent, Respondent from the proper discharge of the duties of his office.

15. Relator says that the Respondent has violated Canon 1, Canon 2 A, and Canon 7 A(4) of the Code of Judicial Conduct, and Canons 4, 28 and 34 of the Canons of Judicial Ethics, and Respondent has engaged in conduct (1) prejudicial to the administration of justice in that he has created a situation in Richland County which precludes him from trying criminal cases; and (2) Respondent has engaged in conduct which brings the judicial office into disrepute in that he has publicly and privately attacked the character, motives and activities of judges, court personnel, the County Prosecutor and officers and officials of the Democratic Party of Richland County.

APPENDIX F

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re: Complaint against: JAMES J. MAYER, Judge, Richland County Court of Common Pleas Richland County Courthouse Mansfield, Ohio 44902, *Respondent,* THE OHIO STATE BAR ASSOCIATION, 33 West Eleventh Avenue Columbus, Ohio 43201, *Relator.*	**Case No. R-76-1** **Report and Certificate of The Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio**

The Board of Commissioners on Grievances and Discipline, in compliance with the provisions of Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio, did, on October 28 and 29, 1976, conduct an investigation into the complaint filed by the Relator, Ohio State Bar Association, against the Respondent, Judge James J. Mayer, Richland County Common Pleas Court, alleging that cause exists for the retirement, removal or suspension from office of Judge Mayer as provided in Gov. R. VI; and R. C. 2701.12.

The Board of Commissioners did by the affirmative vote of 13 members, being more than two-thirds of the

members of said Board, find that there is substantial credible evidence in support of the misconduct allegations as set forth in paragraph one of the complaint and do hereby report to the Supreme Court.

We, the Chairman and Secretary, do certify that the foregoing report truly reflects the result of the investigation of the complaint against Judge James J. Mayer and do hereby report the same to the Supreme Court.

December 9, 1976.

ATTEST: ROBERT R. MOULTAN
Chairman, Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

COIT H. GILBERT
Secretary, Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

APPENDIX G

SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR

Rule IV

PROFESSIONAL RESPONSIBILITY AND JUDICIAL ETHICS

(1) The Code of Professional Responsibility, as adopted by this Court on October 5, 1970, and set forth in 23 Ohio State 2d Reports, shall be binding upon all persons admitted to practice law in the state of Ohio, and the willful breach thereof shall be punished by repremand, suspension or disbarment, as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio. The Code of Judicial Conduct, as adopted by this Court, effective December 20, 1973, and set forth in 36 Ohio State 2d Reports, shall be binding upon all judicial officers of this state, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V, or by retirement, removal or suspension from office, as provided in Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

(Amended eff. 7-15-74)

(2) It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should

be encouraged and the person making them should be protected.

(Amended eff. 2-28-72)

Rule VI

REMOVAL OF JUDGES

Pursuant to legislative authority provided by R.C. 2701.11 and 2701.12, the following rule is adopted, effective February 11, 1966.

1. (a) The written and sworn complaint required by R.C. 2701.11, shall be filed with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court heretofore established under Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, who shall transmit such complaint to the Chairman of the Board. Six copies of the complaint shall be so filed. The complaint shall set forth specifically the grounds claimed to be cause for retirement, removal or suspension of the Judge from office and the time when and place where any act, acts, omission or omissions occurred which are alleged to be cause for such retirement, removal or suspension under R.C. 2701.12. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the relator) and supported by a certificate in writing, signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state (which association shall be deemed the relator), certifying that such counsel is duly authorized to represent the relator in the premises and has accepted the responsibility of prosecuting the complaint to conclusion.

Such certification shall constitute a representation that, after investigation, the relator believes that reasonable cause exists to warrant a hearing on such complaint and shall constitute the authorization of such counsel to represent the relator in the premises as fully and completely as if he or they were designated and appointed by order of the Supreme Court of Ohio, with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved by the acts or omissions of the Judge against whom the complaint is filed.

(b) A judge is disqualified from acting as a judge while there is pending an indictment or any information charging him in the United States with a crime punishable as a felony under state or federal law.

(c) In addition to the cause for removal or suspension of a judge, as provided in R.C. 2701.12, a judge may be removed or suspended from office if he is engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, or engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute, or if he has been indefinitely suspended from the practice of law or permanently disbarred.

2. Upon receipt of such written and sworn complaint by the Chairman of the Board of Commissioners on Grievances and Discipline of the Supreme Court, he shall, as soon as practicable, convene such Board and present to it the complaint. The Secretary of the Board of Commissioners shall send a copy of such complaint to the Judge against whom the complaint is made. The Board shall then proceed to investigate the complaint. After completion of this investigation, if two-thirds of the members of such Board affirmatively determine that there is substantial credible evidence in support of the complaint, the

Secretary of the Board of Commissioners shall certify to the Supreme Court the result of such investigation. The investigation conducted by the Board of Commissioners shall be private. The Board shall have authority to issue subpoenas for such witnesses as are deemed necessary. Subpoenas may be signed by any member of the Board or the Secretary.

3. The report of the Board of Commissioners on Grievances and Discipline shall be sent by certified mail to the Judge against whom the complaint is made at the same time such report is sent to the Supreme Court.

4. The Supreme Court shall, if the report finds there is substantial credible evidence in support of such complaint, appoint within a reasonable time after its receipt a Commission of five Judges, as provided in R.C. 2701.11.

5. The Chairman of the Commission of Judges appointed to determine the question of retirement, removal or suspension of a Judge shall be designated by the Supreme Court. Such Chairman shall promptly after receipt of the notice of his appointment and the receipt of the complaint fix a day for the hearing. Such hearing shall not be in the county seat of the county in which the Judge complained about resides unless requested by the Judge against whom such complaint is made. The Chairman shall determine, in the absence of such request, the place and time of the hearing. The hearing shall be private, with full opportunity for relator and respondent to present witnesses.

6. If the Commission of Judges determines by majority vote that grounds for retirement, removal or suspension without pay have been established by clear and convincing evidence as alleged in the complaint or as provided in R.C. 2701.12, the Commission of Judges shall make such order as in its judgment is necessary and proper.

Notice of any order so made shall be sent by registered mail with return receipt to the Judge against whom the finding has been made and the Supreme Court.

7. Mental disability shall mean the condition defined in R.C. 5122.01(A) which presently prevents the proper discharge of the Judge's duties.

Physical disability shall mean the impairment of the faculties of a Judge, which has prevented the proper discharge of his judicial duties for more than six months. Failure to be present in Court or to perform usual judicial functions for six months or more shall raise a presumption of physical disability.

The Commission shall make such determination of disability based upon the testimony adduced before it. Expert medical testimony may be received by the Commission, and it may name medical experts to examine the respondent, with his consent.

8. Any Judge so retired, removed, or suspended may appeal to the Supreme Court on the record made before the Commission of Judges from the action of the Commission. Notice of such appeal shall be given by the Judge to the Commission of Judges and the Supreme Court within 20 days after his receipt by registered mail of the findings made by the Commission. Thereafter, the time for filing a transcript of testimony, briefs, and the conduct of a hearing shall be as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

9. When a Judge who has been suspended by reason of physical or mental disability wishes to apply for reinstatement, he may do so by filing a petition with the Board of Commissioners on Grievances and Discipline, setting forth the facts which support the alleged restoration to health. This petition will be processed in the same manner as a complaint.

10. The Commission of Judges may take testimony in any manner prescribed by the law of the state of Ohio. All rules of evidence shall be observed in the conduct of hearings before the Commission of Judges. The parties may be represented by counsel.

11. The Commission of Judges shall issue subpoenas for witnesses under the seal of the Supreme Court, signed by a member of the Commission of Judges or the Secretary of the Commission.

The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm or to answer any proper question shall be deemed contempt of the Supreme Court, and such person shall be punished accordingly.

12. Costs and expenses herein incurred by the Board of Commissioners and the Commission of Judges shall be paid from the Admissions and Grievance Fund of the Supreme Court, and the Court may order that such fund be reimbursed by the respondent if the proceeding terminates in retirement, removal or suspension without pay.

13. This Rule and such regulations relating to investigations and proceedings involving complaints and petitions for reinstatement shall be liberally construed for the protection of the public and the Courts and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the adoption of this Rule.

(Amended eff. 2-28-72)

APPENDIX H

OHIO REVISED CODE SECTIONS

2701.11 Retirement, removal or suspension of judge

Subject to rules implementing sections 2701.11 and 2701.12 of the Revised Code, that shall be promulgated by the supreme court, upon written and sworn complaint setting forth the cause or causes and after reasonable notice thereof and an opportunity to be heard, any judge may be retired for disability, removed for cause, or suspended without pay for cause by a commission composed of five judges of this state, all of whom shall be appointed by the supreme court from among judges of the courts of record located within the territorial jurisdiction in each of any five of the appellate districts, not including that within which the respondent judge resides.

Such a commission shall be appointed by the supreme court upon receipt of a report of its board of commissioners on grievances and discipline that such board has received a written and sworn complaint alleging that cause exists for retirement, removal, or suspension of a judge under section 2701.12 of the Revised Code, and that upon investigation and a finding by at least two-thirds of the members of such board that there is substantial credible evidence in support of such complaint. Any judge so retired, removed, or suspended may appeal, on the record made before the commission, from the commission's action to the supreme court. The commission, the court, or a judge thereof may stay execution of an order pending disposition of an appeal. The court may affirm, reverse, or modify the order of the commission.

Members of the commission shall be reimbursed from the state treasury for their actual and necessary expenses in connection with their service on the commission.

The administrative assistant of the supreme court shall be the secretary of each commission appointed to consider retirement, removal, or suspension of a judge. The secretary shall certify each order of a commission which commands the retirement, removal, or suspension of a judge to the governor, the chief justice of the supreme court, and the officer required by law to draw warrants for payment of the salary of such judge.

Upon the request of any such commission, the attorney general shall assist in the performance of its duties.

HISTORY: 131 v S 334, eff. 10-30-65
130 v Pt 2, H 14

2701.12 Cause for removal, suspension or retirement of judge

(A) Cause for removal or suspension of a judge from office without pay under section 2701.11 of the Revised Code exists when he has, since first elected or appointed to judicial office:

(1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;

(2) Been convicted of a crime involving moral turpitude; or

(3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before such election or appointment.

(B) Grounds for retirement of a judge from office for disability exist when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office.

(C) Grounds for suspension without pay of a judge from office for disability exist when he has a physical or mental disability which will prevent the proper discharge of the duties of his office for an indefinite time.

HISTORY: 131 v S 334, eff. 10-30-65

5122.01 Definitions

As used in Chapters 5122., 5123., and 5125. of the Revised Code:

(A) "Mentally ill individual" means an individual having an illness which substantially impairs the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations, and includes "lunacy," "unsoundness of mind," "insanity," and also cases in which such lessening of capacity for control is caused by such addiction to alcohol, or by such use of a drug of abuse that the individual is or is in danger of becoming a drug dependent person, so as to make it necessary for such person to be under treatment, care, supervision, guidance, or control.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-674

JUDGE JAMES J. MAYER,
Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,
Respondent.

BRIEF IN OPPOSITION

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CITATIONS

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-674

JUDGE JAMES J. MAYER,
Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,
Respondent.

BRIEF IN OPPOSITION

The respondent, Ohio State Bar Association, respectfully requests that this Court deny the petition for a writ of certorari, seeking review of the judgment and order of the Supreme Court of Ohio. That judgment and order is reported in 54 Ohio St. 2d 431.

STATEMENT OF THE CASE

This case concerns the judgment of the Supreme Court of Ohio which affirmed an Order of a Commission of Five Judges (hereinafter the Commission) that petitioner be "retired for disability as a Judge of the Court of Common Pleas, Richland County, Ohio, with the right to any emoluments, benefits and compensation allowed by law".

The procedure and the grounds for the retirement of a judge are governed by statute,[1] as authorized by the Constitution of Ohio,[2] and implemented by Rules of the Supreme Court of Ohio.

Respondent (Relator in court below) commenced these proceedings on September 16, 1976, by filing a Sworn Complaint and Certificate with the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court (hereinafter the Board) alleging that cause exists for the removal, retirement, or suspension of petitioner from office. A copy of that Com-

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[1] 2701.11, Revised Code of Ohio

Rules for retirement, removal and suspension of judges; appointment of commission.

Subject to rules implementing sections 2701.11 and 2701.12 of the Revised Code, that shall be promulgated by the Supreme court, upon written and sworn complaint setting forth the cause or causes and after reasonable notice thereof and an opportunity to be heard, any judge may be retired for disability, removed for cause, or suspended without pay for cause by a commission composed of five judges of this state, all of whom shall be appointed by the supreme court from among judges of the courts of record located within the territorial jurisdiction in each of any five of the appellate districts, not including that within which the respondent judge resides.

Such a commission shall be appointed by the supreme court upon receipt of a report of the board of commissioners on grievances and discipline that such board has received a written and sworn complaint alleging that cause exists for retirement, removal, or suspension of a judge under section 2701.12 of the Revised Code, and that upon investigation and a finding by at least two-thirds of the members of such board that there is substantial credible evidence in support of such complaint. Any judge so retired, removed, or suspended may appeal, on the record made before the commission, from the commission's action to the supreme court. The commission, the court, or a judge thereof may stay execution of an order pending disposition of an appeal. The

plaint was served on Petitioner. The full text of the Complaint is attached as Appendix A. Paragraphs 1, 2, 14 and 15 of that Complaint read as follows:

> 1. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent engaged in the conduct hereinafter described prejudicial to the administration of justice and for the reasons that Respondent engaged in the conduct hereinafter described which would bring the judicial office which he holds into disrepute.

---

court may affirm, reverse, or modify the order of the commission.

2701.12, Revised Code of Ohio

Retirement, removal or suspension of judges.

(A) Cause for removal or suspension of a judge from office without pay under section 2701.11 of the Revised Code exists when he has, since first elected or appointed to judicial office:

(1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;

***

(B) Grounds for retirement of a judge from office for disability exist when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office.

---

[2] Article II, Section 38 Constitution of Ohio

Removal of officials.

Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

2. Relator alleges that cause exists to remove Respondent from office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent is suffering from a physical disability and from a mental disability and while so suffering Respondent has engaged in the conduct described below.

14. Relator says that Respondent is suffering either permanently or for an indefinite time from physical and mental disabilities which substantially impair his capacity to use self-control, judgment and discretion in the conduct of his affairs and social relations; and which will prevent, and does now prevent, Respondent from the proper discharge of the duties of his office.

15. Relator says that the Respondent has violated Canon 1, Canon 2 A, and Canon 7 A(4) of the Code of Judicial Conduct, and Canons 4, 28 and 34 of the Canons of Judicial Ethics, and Respondent has engaged in conduct (1) prejudicial to the administration of justice in that he has created a situation in Richland County which precludes him from trying criminal cases; and (2) Respondent has engaged in conduct which brings the judicial office into disrepute in that he has publicly and privately attacked the character, motives and activities of judges, court personnel, the County Prosecutor and officers and officials of the Democratic Party of Richland County.

Under Ohio procedure, the function of the Board is to investigate the allegations of the Complaint, and if two-thirds of the members of such Board find substantial credible evidence in support of such complaint, certify their findings to the Supreme Court.[3]

After investigation, the Board submitted the following report to the Supreme Court of Ohio.

[3] Section 2701.11, Revised Code.

"The Board of Commissioners on Grievances and Discipline, in compliance with the provisions of Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio, did, on October 28 and 29, 1976, conduct an investigation into the complaint filed by Relator, Ohio State Bar Association, against the Respondent, Judge James J. Mayer, Richland County Common Pleas Court, alleging that cause exists for the retirement, removal or suspension from office of Judge Mayer as provided in Gov. R. VI; and R. C. 2701.12. The Board of Commissioners did by affirmative vote of 13 members being more than two-thirds of the members of said Board, find that there is substantial credible evidence in support of the misconduct allegations as set forth in paragraph one of the complaint and do hereby report to the Supreme Court."

Thereafter the Supreme Court, pursuant to Gov. R. VI and Section 2701.11, Revised Code of Ohio appointed a five-judge commission to determine the question of retirement, removal or suspension of Petitioner. The Chairman of the Commission set a date for a hearing and notified both parties.

The Commission conducted hearings on the Complaint on March 15, 16 and April 12, 13, 14, 1977, and ordered that petitioner "be retired for disability as a Judge of the Court of Common Pleas of Richland County, Ohio with the right to any emoluments, benefits and compensation allowed by law".

The evidence on which the order was based was summarized by the Commission as follows: (Petitioner's Brief p. 17A, 18A)

"The evidence established, and the respondent (petitioner) in his brief candidly admits, that beginning in 1961 respondent experienced numerous

health problems. In 1961 respondent contracted viral encephalitis, African sleeping sickness. Prior to 1973 he experienced increasing problems of sleeplessness and depresson. He used alcoholic beverages to excess and in October of 1973 engaged in a public brawl with the manager of a Lima restaurant. Thereafter he was admitted to the University Hospital in Columbus where he was diagnosed as being manic depressive.

"Lithium carbonate was prescribed for respondent. The proper dosage was determined to be one which would maintain a blood level of Lithium at .7%. Respondent was released from University Hospital on November 15, 1973. In October 1974 respondent was advised that he had massive cancer of the large intestine. Thereafter all except the last foot of that organ was removed.

"Carcinoma of the liver was also found. Respondent was released in November 1974. Thereafter, he suffered rectal and urinary incontinence, diarrhea and severe vomiting. As a result of these afflictions, respondent could not or did not maintain the required .7% Lithium level.

"On May 11, 1975, respondent entered the Cleveland Clinic to undergo surgery for the removal of a portion of his liver affected by cancer. Following his release he took a variety of medication. This produced several side effects, including incontinence. Respondent's Lithium level, because of this and also a failure to take the proper dosage was not maintained at the proper level. Respondent again returned to the Cleveland Clinic for treatment relative to his Lithium level, diarrhea, vomiting, asthmatic and prostrate problems.

"The medical evidence is undisputed that surgery has probably arrested the carcinoma of the intestine and that the respondent has lived beyond the life expectancy of persons who have had surgery involving carcinoma of the liver. Further the

respondent offered probative evidence that his manic depressive mental condition is controlled through the maintenance of a .7% level of Lithium Carbonate in his blood.

"When respondent's Lithium level is not maintained, his history, as adduced by the evidence, establishes by clear and convincing evidence that he enters into the manic or hypo manic phase of manic depression, suffers from delusions, and has paranoid symptoms. Respondent contends that since January 1976 he is properly, adequately and fully controlled and no concern should be felt for his proper handling of his judicial duties.

"A majority of the Commission regretfully does not agree.

"Evidence was submitted supporting by clear and convincing evidence the allegations contained in the complaint.[1]

---

[1] "Inter alia the respondent in letters, in a brief which he prepared, duplicated and disseminated 25 copies, in conversations and at public meetings referred to a fellow judge as liar, a cruel saddist, as the Godfather, as part of the Gilligan Mafia, a.k.a. the Dirty Dozen, that the Prosecuting Attorney of the county belonged to the Mafia and was incompetent. Respondent accused a fellow judge and a Democratic official of improper handling of fiscal matters and tried to institute a grand jury investigation of Richland County Democratic officials. Forty-five affidavits of prejudice in criminal matters were filed and granted against Respondent. He does not now hear criminal cases when there is a jury except in an emergency.

"Although respondent's actions have not resulted in criminal action, lewd or lascivious behavior or in the illegal or improper loss of liberty or property of those who appeared before him, his use or attempted improper use of the grand jury can be compared to the actions of *Franko* in *Mahoning County Bar Association v. Franko* (1958) 166 Ohio St. 17."

> "We find therefore that respondent during the period outlined above engaged in acts which violated Canon 1, Canon 2 A of the Code of Judicial Conduct and Canon 4 and 34 of the Canons of Judicial Ethics.[5] He has engaged in such acts as resulted in a substantial loss of public respect for his judicial office, brought his judicial office into disrepute and has engaged in conduct prejudicial to the administration of justice."

Petitioner appealed the order of the Commission to the Supreme Court of Ohio contending (1) that the Commission erred in that the evidence does not support the findings and order of the Commission, (2) that petitioner's actions upon which the Findings and Order of the Commission are premised all relate to statements of petitioner which are protected by the First Amendment to the United States Constitution and the Ohio Constitution, and (3) that the statutes, rules and canons under which these proceedings were conducted are unconstitutionally vague and overbroad in violation of petitioner's due process rights.

Finding Petitioner's contentions to be without merit the Supreme Court of Ohio unanimously affirmed the findings and order of the Commission.

REASONS WHY THE WRIT SHOULD BE DENIED

Neither the decision below nor the record raise the Questions Presented.

The first three Questions Presented in the petition (p. 2), (which are restatements of the same question in different form) contend that the evidence in this

[5] For the text of these Canons see Brief of Petitioner p. 29 A — 30 A.

case does not support the factual findings of the court below. None of those questions were properly raised or decided by the court below. Therefore, this Court lacks jurisdiction to review those questions. Rule 23 (1) (f) of this Court.

FIRST QUESTION PRESENTED

With respect to the first question presented, all that was claimed in the court below was that the evidence did not support the finding and order of the Commission of Judges that petitioner be retired for disability. No federal claim was asserted, and, of course, none decided. Having lost on that issue in the court below, petitioner seeks review here, claiming "plain error", by the court below, relying on the decision in *Thompson v. City of Louisville*, 362 U.S. 199. That case is clearly distinguishable from this one both on its facts and on the ground that the federal claim in *Thompson* was preserved below. In *Thompson* the question was whether his conviction for loitering and disorderly conduct "was so devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment", and it was held that the decision on this question "turns not on the sufficiency of the evidence, but whether this conviction rests upon any evidence at all".

Clearly, the *Thompson* holding is not applicable here. First, the due process question was not raised and preserved in this case, as it was in *Thompson*. Second, the decision of the court below makes it plain that there is ample evidence to support the findings of fact. For example, it is undisputed that the petitioner has a manic depressive illness. It is also undisputed that petitioner's manic depressive illness is treated with

lithium carbonate, a specific treatment to control the manic phase of his illness. However, it is plain from the evidence and the findings below that the lithium treatment does not always work. That fact is relevant to petitioner's contention in the court below that he does not *now* suffer from disabilities.

Two psychiatrists testified in this case. Strangely, their names are Dr. Brown and Dr. Jones. With respect to the question of whether petitioner now suffers from such disabilities as to warrant the retirement order by the court below, the medical evidence is undisputed that petitioner has a permanent manic depressive psychosis; both psychiatrists so testified, and further that there is no known cure for the illness.[6] Petitioner's attending psychiatrist, Dr. Jones, testified that petitioner was first hospitalized in October 1973 after engaging in a public brawl in a restaurant. According to Dr. Jones, petitioner was admitted to the hospital following four days of hyperactivity, excessive irritability, heavy drinking, belligerent behavior, flight of ideas, grandiosity, some suspicious ideas, which included dealing with the CIA, that he was a five star general, president of the United States and that the Mafia was after him.[7] The diagnosis of mania was made at that time and Lithium Carbonate, a treatment for mania, was prescribed.[8] Lithium Carbonate, a chemical compound, is a specific treatment for mania. It is not a cure for the illness; the illness continues to operate behind the scenes.[9] The Lithium seems to operate to suppress mania when it is present subclinically.

[6] Tr. 3-16, p. 61; 4-13 pp. 195-196.
[7] Tr. 4-13 pp. 164, 165.
[8] Tr. 4-13 p. 166.
[9] Tr. 4-13 p. 166.

The Lithium level in the blood is very relevant to the control of mania.[10] In petitioner's case, the level was determined to be at least .7%. If petitioner's level drops below that figure and the mania phase of his illness is active subclinically, and is being suppressed by the Lithium, then Dr. Jones testified he would expect petitioner to become ill again.[11] Dr. Jones testified that he saw petitioner on July 7, 1975, as an outpatient (following petitioner's last surgery in May 1975) and felt he was doing well.[12] He next saw petitioner on October 22, 1975, and he had changed from the way he was July 7. When he saw him on October 22, 1975, he was again irritable, easily aggravated, inclined to be authoritarian, had a lot of excess psychomoter activity, and his thoughts were grandiose. He was preoccupied with thoughts about conspiracy to persecute him. Petitioner had been taking Lithium medication three times a day but it hadn't benefited the same way it had before.[13] Dr. Jones testified that when he saw petitioner on October 22, 1975, his Lithium level was 0.8%, which he thought was satisfactory, but that the Lithium level has to be at a therapeutic level for approximately a week to have a good effect.[14] Dr. Jones was unable to explain the change in petitioner's demeanor; he said that petitioner's surgeries may have been the cause since petitioner was without Lithium for about eight days in May 1975. But in August and September he was taking Lithium as prescribed, and suffered exacerbations of his illness

[10] Tr. 4-13 p. 167.
[11] Tr. 4-13 p. 169.
[12] Tr. 4-13 p. 136.
[13] Tr. 4-13 p. 137.
[14] Tr. 4-13 p. 139.

anyway, which was apparently caused by having a low serum Lithium level, but he did not know for sure. He thought three things may have been involved. One was that petitioner was having an adverse reaction to chemotherapy, and another was he was taking a diuretic for hypertension, and the third was that petitioner likely suffered an exacerbation of his illness at that time, and the latter would have nothing to do with other medications petitioner was talking at that time.[15] Furthermore, there is medical evidence that during the course of petitioner's illness he has displayed paranoid symptoms, and suffers from delusions. Dr. Brown so testified.[16] Dr. Jones so testified.[17]

In sum, the above medical evidence, and much more medical evidence, and the conduct of petitioner when not under control, support the finding below (Pet. p. 4A, 5A)

> "When respondent's (petitioner's) Lithium level is not maintained, his history, as adduced by the evidence, establishes by clear and convincing evidence that he enters into the manic or hypo manic (not yet manic, but heading towards it) phase of manic depression, suffers from delusions, and has paranoid symptoms."

Therefore, without regard to the jurisdictional question, the decision of the court below is clearly correct.

SECOND QUESTION PRESENTED

In his second question petitioner contends he was deprived of due process of law through the applica-

[15] Tr. 4-13 p. 199, 200.
[16] Tr. 3-16 p. 53, 62, 69.
[17] Tr. 4-13 p. 188, 189.

tion of an unforeseeable standard of law not contemplated under the requirements of the statute providing grounds for retirement from office.

This question was first raised in petitioner's motion for rehearing in the court below. The motion for rehearing was denied, without opinion. Under such circumstances that question is ordinarily not reviewable here.

> "Questions first presented to the highest state court on a petition for rehearing came too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition." (Citation omitted) *Radio Station WOW, Inc., Johnson*, 326 U.S. 120, 128.

Nonetheless, petitioner contends that the application of a "latent possibility" standard by the court below in determining his disability was an "unforeseeable and retroactive judicial expansion of the clear, narrow, and precise terms of Section 2701.12 (B), Revised Code of Ohio, in violation of Petitioner's right to fair notice of the charges under the Fourteenth Amendment of the United States Constitution." (Pet. p. 18, 19)

Parenthetically, it may be noted that while petitioner claims here that the terms of Section 2701.12 (B), Revised Code of Ohio, are "clear, narrow and precise", in the court below he claimed that the same statute, rules and canons under which these proceedings were conducted are "unconstitutionally vague and overbroad" in violation of his due process rights. (The decision below Pet. p. 10 A) But petitioner's claim ignores the actual holding of the court below, which in its full context was:

> "The record amply demonstrates that when appellant's (petitioner's) lithium level is not properly maintained he has engaged in conduct violative of the foregoing canons (of judicial ethics). Given appellant's present physical condition, there is ever-present the latent possibility of recurrence of the conditions which precipitate erratic and non-judicious conduct. Bearing in mind that Gov. R. VI, as stated in Section 13, is to be '*** liberally construed for the protection of the public and the Courts ***,' this court concludes that the commission did not err in finding that appellant (petitioner) "*** has a physical and mental disability which prevents the proper discharge of the duties of his office."

"Latent" means that the condition in question is present and capable of becoming though not now visible or active.[18] Thus, the court below is saying that petitioner's conceded physical condition, including his manic depressive illness, coupled with the evidence as to unfortunate conduct by petitioner creates a sufficient possibility of recurrence that it is unwise for him to remain on the bench. That, of course, is not the same as saying that petitioner has the possibility of having an illness. He has a whole flock of illnesses. Therefore, there is nothing "unexpected" in the decision below. On the contrary, it is a clear affirmation of the Findings and Order of the Commission of Judges that petitioner has a physical and mental disability which prevents the proper discharge of the duties of his office. And under the provisions of Section 2701.12 (B) Revised Code of Ohio either of those findings are grounds for retirement.

This court has neither jurisdiction nor concern over the question whether the court below properly applied

[18] Webster's Third New International Dictionary, p. 1275.

Section 2701.12 (B), Revised Code of Ohio, to the facts of this case so long as there is some evidence to support the factual findings and judgment. As noted above there is ample evidence to support the findings and order in this case.

THIRD QUESTION PRESENTED

In his third question petitioner contends that he was deprived of due process of law "when he was tried 'convicted' and order retired from office even though the allegations constituting grounds for retirement from office had been eliminated prior to the hearing by a body acting in the capacity similar to a grand jury". This question was neither raised, nor preserved in the court below. Therefore, this Court is without jurisdiction to review it. Rule 23 (1)(f). Furthermore, the contention that petitioner did not receive adequate notice of the charge, and an opportunity to defend, is wholly without foundation. At the outset of the hearing before the Commission of Judges, petitioner moved to limit evidence to the charges in paragraph one of Respondent's Complaint relating to his conduct (App. B. p. 1) contending that the Board of Commissioners on Grievances and Discipline had eliminated paragraph two relative to his health. The Commission unanimously overruled that motion. The Commission held that under the Ohio statutes and Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio, the Board of Commissioners on Grievances and Discipline did not and did not have authority to eliminate the allegation in Respondent's Complaint concerning the issue of petitioner's health. (Findings and Order of the Commission Pet. p. 20 A, 21 A) And, it bears repeating, that petitioner was informed of the Commission's ruling at the outset of the

hearing. Thereafter, evidence relevant to petitioner's health was submitted by both parties. It is frivolousness to claim that petitioner did not have notice of the charge and an opportunity to defend.

FOURTH QUESTION PRESENTED

Finally, petitioner contends that he was involuntarily retired from office for making public statements about public officials, off the bench, in derogation of his rights to exercise First Amendment guarantees.

The claim is without merit. Petitioner was not ordered retired because of his public attacks on the character of judges and other public officials. He was ordered retired for physical and mental disability.[19] Thus, the judgment below rests on non-federal grounds without regard to the federal question sought to be raised here.

Petitioner argues in support of this proposition "that it must be concluded that the Supreme Court of Ohio took the action it did as a means to punish Petitioner for certain statements he made which are protected by the First Amendment of the United States Constitution." That statement is not only unwarranted, but also unworthy of petitioner. There is nothing in the record of this case that would even suggest that the Supreme Court of Ohio sought to punish petitioner because of his public statements.

---

[19] Opinion of the court below. Pet. p. 7 A, 8 A.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certorari should be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing has been mailed by first class mail with postage prepaid to Counsel for Petitioner, Russell P. Herrold, Jr., 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216.

Respectfully submitted,
JOHN R. WELCH

APPENDIX A

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Filed September 16, 1976

In re:
Complaint against

HON. JAMES J. MAYER,
Judge, Court of Common Pleas,
Richland County,
Mansfield, Ohio 44092,
Respondent,

vs.

OHIO STATE BAR ASSOCIATION,
33 West 11th Avenue,
Columbus, Ohio 43201,
Relator.

No. R-76-1

SWORN COMPLAINT AND CERTIFICATE

(Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio)

1. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent engaged in the conduct hereinafter described prejudicial to the administration of justice and for the reason that Respondent engaged in the conduct hereinafter described which would bring the judicial office which he holds into disrepute.

2. Relator alleges that cause exists to remove Respondent from the office of Judge of the Court of Common Pleas of Richland County, Ohio for the reason that Respondent is suffering from a physical disability and from a mental disability and while so suffering Respondent has engaged in the conduct described below.

3. Respondent has been in ill health since 1961, when he became ill due to viral encephalitis. He has never fully recovered from that illness. In 1962, Respondent suffered depression and was hospitalized. In 1966, Respondent again suffered depression due to encephalitis and was admitted to Upham Hall of Ohio State University Hospital. He was released in 1966, although still ill. In 1967, Respondent developed insomnia and was admitted to Mansfield General Hospital and then again to Ohio State University Hospital.

4. In 1968, Respondent again assumed the bench and from 1968 to 1972, he developed an addiction to the use of prescription drugs. From 1968 to October 1974, for various periods of time, Respondent was admitted to St. Rita's Hospital, Lima, Ohio, and to Ohio State University Hospital.

5. In October and November 1974, Respondent was admitted from time to time to Cleveland Clinic where he was also an outpatient. Respondent was twice operated for malignancy in Cleveland Clinic in 1974, and thereafter, commenced a course of chemotherapy which was completed in December 1975.

6. In about August 1973, and continuing thereafter, Respondent wrote numerous letters and other documents and made public statements printed in the newspapers in which he alleged various conspiracies among the judges, court personnel, public officials, officers of the Democratic Party and others in Richland County, and officers and officials of the State of Ohio,

to harm the Respondent so as to cause him to be removed from office or to discredit his reputation. By his written and oral statements, Respondent has made himself a public issue.

7. On August 22, 1973, Respondent wrote to Judge Richard M. Christiansen, Court of Common Pleas, Probate Division, Richland County, requesting Judge Christiansen to take over as Common Pleas Judge supervising a Grand Jury investigation of the Democratic Party of Richland County, and to try all criminal cases arising from the investigation. Respondent alleged, in part, that

> "The pattern of misuse of a public trust and the Democratic Party for private advantage and gain for a period of time that extends back to the early '60's through May of '73 is so unbelievably gross, wicked and dishonest that if exposed fully will, in my opinion, make Watergate, Crofters and the Perfuma incident in England tea parties by comparison."

8. On October 4, 1973, Respondent again wrote to Judge Christiansen in part as follows:

> "This will advise that as a friend I would like to request that you select the best foreign lawyer you can find, as 80% of our Bar hates your guts and I would not trust anyone who you are not positive is very close to you to give you any advice. I will be in touch with you Tuesday in person or by letter with full details of your problem.
>
> "As a clue, the people in Shelby think you are using your office, particularly the lunacy section of your court, to falsely accuse me of being a lunatic and/or driving me to it as they are fully familiar with the fact that you were the architect of the fiasco that was to be an orderly John Glenn party. They are so angry that it is entirely possible that someone will do you personal violence.

> "The lawyers on the other hand feel you are practicing law while you are a judge as well as using your office because you are jealous of my success and want to harm me and because Governor Gilligan has made you part of the team that persecuted and tried to bury the All American Boy, John Glenn.
>
> "These are minor problems you have. May I suggest as an old and dear friend that after the first of the week you go to Canada, Mexico or even to Europe, give your lawyer my name and have him contact me personally. Make arrangements so we can keep you advised."

9. On October 5, 1973, Respondent wrote to Judge Ralph E. Johns, Court of Common Pleas, Division of Domestic Relations, Richland County, in part, as follows:

> "You think this letter is to apologize for rudely beating on your door, I am going to tell you you had it coming and I do not intend to apologize.
>
> "Since I have someone in every office in the courthouse who is more loyal to me than to their employer, it has been reported to me that you have made the following observations: 1. Gilligan is a great guy because he signed your pay raise. 2. Donald Kindt is your friend. 3. You have spoken in friendly terms concerning Donald Hout. 4. You think you took Dave Walker away from Judge Christiansen. I have news for both of you, he is a better friend of mine than either of you.
>
> "I find it necessary to teach you respect for the senior judge, so the above Governor who hates me will be calling on me at my office or he is the dumbest man in America; Kindt thinks Joe Seifert gave him just cause to suspend him while, in fact, I created the situation for that purpose. He further thinks Judge Puglisi is a better friend of his than mine because he got the Governor to change his mind about appointing Bob Lett. etc. ***.

"To get even with me Kindt has been telling all these people that I am mentally unbalanced. He has gotten so excited about his lie that now he is boldly calling friends in Shelby, who have witnesses on an extra phone, in their home, telling them of my lunacy. ***

"I am tired of playing with Kindt as he not only slanders me per se but encourages his friends to spread rumors. I am not going to break his friends with civil suits but if you shove me further, I will him.

"Now I am going to teach you a lesson because I am tired of people telling me how to run my life as I just want to be a judge, raise my family and be left alone. I am going to teach your Governor manners; I am going to teach Mr. Kindt manners and I am going to teach Mr. Hout manners.

"Fortunately Walker is my friend or I would include him. When I get through, you are the one who is going to crawl on your belly and apologize to me for fear you will be next. etc."

10. For the January 1975 term, Respondent presided over the Grand Jury. At that time, in Richland County, the judge who presided over the Grand Jury was assigned all the cases arising out of action by that Grand Jury. Respondent appointed Louise Bush as forelady of the Grand Jury. After her appointment, in February 1975, Respondent called her into his chambers and instructed her that without the knowledge of the County Prosecutor and anyone else except the necessary personnel in the Clerk's and Sheriff's offices, she was to initiate an investigation of the Richland County Democratic Party and particularly an investigation of its finances. Respondent gave the forelady a list of persons to be served with subpoenas. On or about February 28, 1975, Respondent also conferred with the Sheriff of Richland County and his deputy, relative to

their serving the subpoenas and relative to their obtaining a search warrant to secure the contents of a safe deposit box allegedly owned by the Democratic Party. These instructions included among other things, a list of municipal court judges from whom the Sheriff should solicit the search warrant. Respondent impressed the burden of secrecy on all persons involved. Respondent also instructed the forelady to deposit all property secured by the search warrant in a special location in the Respondent's chambers.

11. In August 1975, Respondent heard an habeas corpus action with respect to one Lynn Seaman, an inmate in the Ohio State Reformatory who had been convicted and sentenced for possession of marijuana. Respondent granted the writ, with conditions, on August 12, 1975. A motion for reconsideration was filed. In his Opinion and Journal Entry overruling the motion for reconsideration, Respondent made a personal attack on the Prosecuting Attorney, William F. McKee, and the manner in which he conducted his public office. Thereafter, Prosecutor McKee filed a Petition for Writ of Prohibition in the Court of Appeals for Richland County seeking to prohibt Respondent from carrying into effect his order granting the writ of habeas corpus. Respondent filed a Motion to Dismiss in the Court of Appeals and a Petition and Brief in Prohibition in the Supreme Court of Ohio. In each of these pleadings, motions and briefs in the prohibition actions, the Respondent made vicious personal attacks on Prosecuting Attorney McKee; and in Respondent's Motion and Brief to Dismiss in the Court of Appeals, Respondent again details at great length the alleged political conspiracies to oust him from office, and made vicious personal attacks against the alleged co-conspirators Donald Hout, Vice Chairman

of the Democratic Party; Prosecuting Attorney William F. McKee; Judge Richard M. Christiansen and his wife; and Donald Kindt.

12. In December 1975, and the first quarter of 1976, Prosecuting Attorney William F. McKee filed some forty-five (45) affidavits of prejudice against the Respondent. All have been granted by the Chief Justice of the Supreme Court. In the briefs and letters filed by the Respondent with the Supreme Court pertaining to those affidavits, the Respondent again made vicious personal attacks against Prosecutor McKee.

13. The Mansfield News Journal has published articles pertaining to the public allegations by the Respondent against Judge Richard M. Christiansen, Donald J. Kindt, Donald Hout, Jack Davis, and Prosecuting Attorney William F. McKee. The public is therefore informed of the political conspiracies alleged by the Respondent, of the Respondent's charges involving the Democratic Party officers, of Respondent's ill health, of Respondent's charges against Prosecutor McKee and of Respondent's disqualification by the Supreme Court to hear all assigned criminal cases.

14. Relator says that Respondent is suffering either permanently or for an indefinite time from physical and mental disabilities which substantially impair his capacity to use self-control, judgment and discretion in the conduct of his affairs and social relations; and which will prevent, and does now prevent, Respondent from the proper discharge of the duties of his office.

15. Relator says that the Respondent has violated Canon 1, Canan 2 A, and Canon 7 A(4) of the Code of Judicial Conduct, and Canons 4, 28 and 34 of the Canons of Judicial Ethics, and Respondent has engaged in conduct (1) prejudicial to the administration of justice in that he has created a situation in Richland County which precludes him from trying criminal cases; and (2) Respondent has engaged in conduct which brings the judicial office into disrepute in that he has publicly and privately attacked the character, motives and activities of judges, court personnel, the County Prosecutor and officers and officials of the Democratic Party of Richland County.

NOW, THEREFORE, Relator says that Respondent should be retired, removed or suspended from office as provided in Gov. R. VI, and Section 2701.12, Revised Code of Ohio.

/s/ JOHN R. WELCH
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Columbus, Ohio 43201

/s/ ALBERT L. BELL
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Counsel for Relator

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Counsel for Relator

CERTIFICATE

The undersigned, Thomas E. Palmer, Chairman, of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association hereby certifies that Harlan S. Hertz, Eugene Balk, John R. Welch and Albert L. Bell, are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated August 17, 1976

/s/ THOMAS E. PALMER
Chairman

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

I, Harlan Stone Hertz, being first duly sworn, depose and state as follows:

1. I am an Attorney at Law admitted to practice before the Supreme Court of Ohio.

2. I am a member of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

3. In pursuit of my responsibilities as a member of said Committee I, among others, have made an investigation of complaints referred to said Committee concerning the conduct of Judge James J. Mayer.

4. I participated in the preparation of the foregoing Complaint; and based upon such investigation and based upon my review of documentation available to me I believe the allegations set forth in the foregoing Complaint to be true.

/s/ HARLAN STONE HERTZ

Sworn to before me at Cleveland, Ohio this 30th day of July, 1976.

Notary Public
/s/ LAWRENCE J. FRIEDMAN
Attorney At Law

Notary Public —
State of Ohio

My commission has no
expiration date.
Section 147.03 R.C.